



THE UNIVERSITY *of* EDINBURGH

Edinburgh Research Explorer

Protection of Fundamental Rights Post-Lisbon

Citation for published version:

Lock, T & Layden, P 2011 'Protection of Fundamental Rights Post-Lisbon: The Interaction between the EU Charter of Fundamental Rights, the European Convention on Human Rights (ECHR) and National Constitutions (FIDE National Report for the United Kingdom)' University of Edinburgh, School of Law, Working Papers. <https://doi.org/10.2139/ssrn.1940381>

Digital Object Identifier (DOI):

[10.2139/ssrn.1940381](https://doi.org/10.2139/ssrn.1940381)

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Peer reviewed version

Publisher Rights Statement:

© Lock, T., & Layden, P. (2011). Protection of Fundamental Rights Post-Lisbon: The Interaction between the EU Charter of Fundamental Rights, the European Convention on Human Rights (ECHR) and National Constitutions (FIDE National Report for the United Kingdom). University of Edinburgh, School of Law, Working Papers. 10.2139/ssrn.1940381

General rights

Copyright for the publications made accessible via the Edinburgh Research Explorer is retained by the author(s) and / or other copyright owners and it is a condition of accessing these publications that users recognise and abide by the legal requirements associated with these rights.

Take down policy

The University of Edinburgh has made every reasonable effort to ensure that Edinburgh Research Explorer content complies with UK legislation. If you believe that the public display of this file breaches copyright please contact openaccess@ed.ac.uk providing details, and we will remove access to the work immediately and investigate your claim.



FIDE XXV CONGRESS

Topic 1

Protection of Fundamental Rights post-Lisbon: The Interaction between the EU Charter of Fundamental Rights, the European Convention on Human Rights (ECHR) and National Constitutions

United Kingdom National Report

Submitted by UK National Rapporteurs

Patrick Layden QC TD, Scottish Law Commission

Dr Tobias Lock, School of Law, University of Surrey

Introduction

1. We should start with a brief explanation of the constitutional background against which the United Kingdom gives effect to what have become its obligations under the European Convention on Human Rights ('the Convention'). The most basic principle in UK constitutional law is that Parliament is sovereign. An Act of Parliament will trump any other form of legislative or legal act including, in the ordinary case, an international obligation entered into by the Government on behalf of Her Majesty. A further consequence of the sovereignty of Parliament is that one Parliament cannot bind itself, let alone its successors, not to alter the laws it has made. So where a later Act is inconsistent with a former one, the later Act is held to have "impliedly repealed" the earlier one.
2. In recent years this doctrine of 'implied repeal' has been questioned, in relation to certain statutes. It has certainly not been applied in relation to statutes which have been found to be inconsistent with the UK's treaty obligations under the EU Treaties. Thus, when certain provisions of the Merchant Shipping Act 1988 were found by the European Court of Justice ('the ECJ') to be incompatible with the UK's Community obligations, the House of Lords had no difficulty in holding that European law must prevail, not that the 1988 Act had impliedly repealed the European Communities Act 1972¹.
3. In relation to Human Rights, the United Kingdom was one of the original drafters of the Convention, which was seen as an attempt, at international level, to prevent a situation in which a Government could remove what were seen as fundamental rights from its citizens. Essentially, the rights set out in the Convention were those which were thought already to be secured to the citizen in the United Kingdom, albeit in different ways, in both of the two law areas operating in that country. Accordingly, the United Kingdom (like the other original States parties) did not, at the time of ratification of the Convention, consider that any of the prohibitions contained in it would be of any practical significance for the UK itself.
4. When the right of individual application to the ECtHR was accorded to British citizens in 1966, that early view was found to be too optimistic. Between the according of that right, and the coming into force of the Human Rights Act 1998 ('the HRA'), proposed legislation

¹ *Regina v Secretary of State for Transport ex parte Factortame Ltd and Others* [1991] A.C. 603: 'If the supremacy within the European Community of Community law over the national law of member states was not always inherent in the E.E.C. Treaty (Cmnd. 5179-II) it was certainly well established in the jurisprudence of the European Court of Justice long before the United Kingdom joined the Community. Thus, whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary. Under the terms of the Act of 1972 it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law'. (per Lord Bridge of Harwich at paragraph 4).

was routinely examined so as to ensure its compatibility with the obligations in the Convention, and doubtful cases were scrutinised at an appropriate level within Government.

5. When, in 1997-98, the then Government agreed to enable Convention rights to be litigated directly in UK courts, they addressed the question of incompatible statutory provision. The HRA expressly provides that (all) primary legislation, whether passed before or after that Act, is to be read in a way which is compatible with Convention rights. So an Act of Parliament which appeared to be incompatible with the HRA (and hence the Convention) would not be taken impliedly to have repealed the HRA. Instead, by virtue of section 3 HRA, it would be interpreted, if at all possible, so as to be consistent with the Convention. The sovereignty of Parliament is preserved by a provision to the effect that, if an Act cannot be read consistently with the Convention, then the court may do no more than declare that it is incompatible. The inconsistent Act remains in force, and the Government and Parliament must decide, on a political level, whether to rectify the situation. (For example, the House of Commons has recently indicated, very clearly, that it was not minded to extend voting rights to convicted prisoners.)

6. This process of pre-legislative scrutiny for compliance with Convention obligations was formalised when the HRA was passed. Section 19 of that Act requires the Minister promoting Government legislation to state that, in his view, the provisions of the legislation are, or are not, compatible with Convention rights. Apart from legislation, that Act essentially made compliance with the Convention into a duty imposed on all public authorities. Section 6(1) of the Act provides:

‘6(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.’

7. In the course of these answers we will see some examples of how the UK courts have interpreted that provision.

8. In the light of what has happened in relation to European and Convention rights, UK courts are beginning to develop a theory that while all Acts of Parliament are notionally equal in force and effect, some may be more equal than others, in the sense that the doctrine of ‘implied repeal’ does not apply in relation to them. Thus, so this theory runs, it would be competent for the UK Parliament to repeal the European Communities Act 1972, or the 1998 HRA, but that would require to be done formally and deliberately. The courts will not assume that, because a later Act appears inconsistent with the terms of either the 1972 or 1998 Acts, Parliament must have decided impliedly to repeal the Act concerned. Into this category of special, constitutional Acts have gone the (English) Magna Carta of 1216, the

(English) Bill of Rights 1688, the (Scottish) Claim of Right Act 1689, the (UK) European Communities 1972 Act, the HRA, and the constitutional settlements with Scotland, Wales and Northern Ireland².

9. We should enter a caveat here. Even where an Act is regarded as a constitutional Act, it does not follow that every provision in it sets out some general principle which will hold good for future generations. For example, the Claim of Right Act 1689 sets out, in Scotland, the various ways in which James VII (of Scotland) and II (of England) had acted unconstitutionally, and specifically provided that such abuses must stop. Thus, there is a prohibition on the Crown from purporting to annul laws made by Parliament. That remains a valid concern, that the Executive should not be able to ignore or supersede legislation passed by Parliament, and that provision still has force in modern times. But the Act also prohibits the establishment of Catholic schools, a prohibition entirely understandable in the context of Scotland (and England) in 1688-89, but no longer valid. So it is not sufficient, to declare a right to be fundamental, to say that it is to be found in a 'constitutional' Act. Nor is it sufficient to say that it has been in force for a considerable time. It must be a right which succeeding generations agree to be so.

10. The position, at least in the United Kingdom, is that fundamental rights are not to be found in any single Act of Parliament, constitutional or otherwise. They are to be found in an amalgam of substantive common law rights, statutory provisions and procedural rules which, taken together, secure the appropriate balance between, on the one hand, the public interest in the prosecution of offences and, on the other, the fundamental rights of the citizen.

11. A further complication, in the UK, was the passing of the various devolution statutes, also in 1998, which set up legislative bodies in Scotland, Wales and (now) in Northern Ireland. In this case the Westminster Parliament did not simply rely on the fact that section 6 of the HRA would apply to the new administrations. Taking the legislation relating to Scotland as an example, while the Scottish Executive – the Scottish Ministers – were, like other public authorities, subject to section 6(1) of the HRA, specific provision was inserted into the Scotland Act 1998 making it outside competence for the Scottish Ministers to act incompatibly with the UK's obligations under the Convention, and under EU law. Thus, section 57(2) of that Act provides:

² Cf *Thoburn v Sunderland City Council* [2002] EWHC 195 Admin per Lord Justice Laws at paragraph 62.

‘57(2) A member of the Scottish Executive has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights or with Community law.’

12. This formulation raises several issues domestic to the different jurisdictions in the United Kingdom, but we shall mention only three, and look (briefly) at only one. The first is that both the HRA and the Scotland Act enable UK courts to examine the compatibility, or the potential compatibility, of *proposed* acts of public authorities, whereas the ECtHR examines what has happened *ex post facto*. This means that UK courts now have the power to prevent such action, rather than simply granting a remedy once an incompatible action has taken place. This has, not unnaturally, produced a large number of attempts to prevent action on the part of public authorities.

13. The second issue, which is primarily relevant for the devolved Scottish government, is what would be the position if an obligation under the Convention proved to be irreconcilable with an obligation under EU law. This latter point has become more important following the coming into force of the Lisbon Treaty, which provides that the Charter of Fundamental Rights has the same legal effect as the Treaties. In that connection we shall look in due course at the links between the two documents.

14. The third issue, which arises only in domestic terms, is whether the phrase ‘has no power---to do any ---act’ carries the same meaning as ‘it is unlawful for a public authority to act’. In terms of the Convention, the ECtHR is almost invariably asked to decide upon the compatibility of some action which has occurred some time previously, and after a litigation has progressed through all the stages of the domestic legal processes. Its decision that the action was incompatible with the Convention is accompanied by a remedy, which may amount to no more than a declaration. Where action is required by the state concerned to rectify the matter, that too may take some time.

15. The situation is very different, and of much greater practical immediacy, where the domestic court can take a decision as to the compatibility of a proposed action with the Convention. The question which arises is whether a court considering the matter prior to the action taking place can take the same approach, in particular in relation to remedies, as can the ECtHR. Much of course will turn on the way in which the terms of the Convention have been incorporated into the law of the state concerned. We have already mentioned the UK solution, which takes the form of declarations of incompatibility. This question of possible remedies arises in relation to what may be a ‘gap’ in the protection afforded by the Convention in terms of Question 1, to which we now turn.

Q 1 Are there any remaining (potential or actual) gaps in the substantive scope and level of protection of fundamental rights? And can (potential) gaps in one fundamental rights source be filled by reference to other fundamental rights sources?

16. With regard to the first part of the question, it is probably the case that the drafters of the original Convention would have conceded that there were gaps in the substantive scope and level of protection of fundamental rights (cf. the minority judgment in *Feldbrugge v The Netherlands*, *infra*.) It is certainly the case that a number of further rights, or refinements of existing rights, have been developed either by Protocols attached to the original Convention or by the ECtHR. We will suggest one example of what may be a gap, in relation to the Convention. With regard to the second part, there are a number of instances where, even in relation to what might appear to be the same fundamental right, there are overlaps and in at least one case a clear difference between the Convention and the Charter, although how far these are deliberate extensions on the part of the later document is open to question.

Right to trial within a reasonable time

17. We would suggest that a gap in protection may have developed in relation to the right to be tried within a reasonable time, conferred by Article 6(1) of the Convention. Essentially, the question is whether, if the prosecuting authorities in a State have failed to bring about a trial within a reasonable time, they should be allowed to do so thereafter. The matter is illustrated by two cases before the highest courts in the UK, which also demonstrate the difficulties inherent in seeking to channel appeals from what are essentially different jurisdictions to a single appellate body.

18. In 2002 the Judicial Committee of the Privy Council was asked to consider the appeal of a Mr Rourke, who had been charged in 1995 with two offences of indecent conduct towards young girls³. Nothing further had been done, but in 2001 he was again charged, on indictment, with those offences, as well as with others. He maintained that the time which had elapsed between the original charge in 1995, and the new charge in 2001, meant that by the time the proceedings were concluded the requirement, under Article 6(1) of the Convention, that he be tried within a reasonable time would have been breached.

19. In consequence of the judicial arrangements then in place in the UK, human rights issues arising in England and Wales were referred to the Appellate Committee of the House of Lords, and human rights issues arising under the Scotland Act were referred to the Judicial Committee of the Privy Council. Both of these august bodies were drawn from the same

³ *HM Advocate v R* 2003 S.C. (P.C.) 1; [2004] 1 A.C. 462.

panel of distinguished judges, but in Scottish cases before the Privy Council it was customary to secure that three out of the (normally) five judges were from that jurisdiction.

20. Mr Rourke's claim, in particular, was that, since there had been 'an unreasonable delay', in terms of Article 6(1) of the Convention⁴, the Lord Advocate (the Scottish public prosecutor) 'had no power' to continue proceedings against him⁵.

21. The Lord Advocate essentially conceded that the delay had been unreasonable, in terms of Article 6, but said that since a fair trial was still possible he should be allowed to proceed. The court held first, by a (Scottish) majority, that it would be incompatible with the accused's rights under Article 6(1) for a trial to take place after the elapse of a 'reasonable time'. Second, they considered the question of remedy, and whether the different formulations of section 6(1) of the HRA and section 57(2) of the Scotland Act produced different results. By the same majority, they held that the results were indeed different:

'If only the HRA applied, then the result of any finding of incompatibility would be that the Lord Advocate's "act" would be unlawful. There would be an act of the Lord Advocate but an unlawful act. But the Lord Advocate is not simply a public authority to whom section 6(1) of the Human Rights Act applies; he is also a member of the Scottish Executive to whom, in addition, section 57(2) of the Scotland Act applies. And subsection (2) goes further than section 6(1) of the Human Rights Act. By virtue of subsection (2) the Lord Advocate actually has no power to do an act so far as it is incompatible with any of the appellant's Convention rights. To that extent any such "act" of the Lord Advocate is invalid: it is not truly an "act" at all but merely a "purported" act.' (*per* Lord Rodger of Earlsferry at paragraph 125.)

22. Essentially the same question came before the Appellate Committee of the House of Lords in December 2003⁶, where a panel of nine judges (including four of those who had sat on the Judicial Committee in the previous case) found, by an (English) majority that it was *not* incompatible with an accused's rights under Article 6(1) to hold a trial after the elapse of a reasonable time, provided always that it remained possible to hold a fair trial. (The court also found, by the same majority, that there was no difference between the concepts of acting

⁴ '6(1) In the determination ----of any criminal charge against him, everyone is entitled to a fair and public hearing *within a reasonable time* ' (emphasis added).

⁵ '[H]e asserts that, if by going on with the prosecution the Lord Advocate infringes his right to a hearing within a reasonable time, then he must stop – not because the Convention says so but because section 57(2) of the Scotland Act says he has no power to go on' (*per* Lord Rodger of Earlsferry, at paragraph 138).

⁶ *Attorney General's Reference No 2 of 2001* [2003] UKHL 68.

unlawfully, in the HRA, and having no power to act, in the Scotland Act.⁷ That particular aspect of the House of Lords' decision would appear to give little weight to section 8 of the HRA, subsection (1) of which provides that:

‘8(1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.’

23. The effect of these judgments was to produce different views as to the compatibility or otherwise of a trial held after a reasonable time as between Scotland, on the one hand, and England and Wales, on the other. On one level, this does no more than reflect the different arrangements within the respective jurisdictions for dealing with criminal offences. In Scotland there is and has always (or at least since 1701⁸) been a requirement to conduct criminal prosecutions expeditiously, and within statutory time limits. If these are not complied with then the proceedings must be abandoned, and the accused cannot be charged again with that offence. The practices and procedures of the public prosecutor in Scotland work within these statutory requirements.

24. In England and Wales (and in a number of other European jurisdictions) the prosecutor is given more latitude. Thus, in *HM Advocate v R* (*cit. sup.*), Lord Steyn observed:

‘For my part the interpretation advocated by the appellant would result in severe disruption of the effective and just functioning of the criminal justice system.-----If such a view were to be adopted in England-----the result would be a huge increase in stay applications in criminal courts at every level, with detrimental effect on the administration of justice.’⁹

25. We suspect that similar concerns would be voiced in a number of Continental European jurisdictions. In that context we note that the European Council's Roadmap of November 2009¹⁰ promised (and has begun to deliver) action on a range of issues for strengthening the rights of an accused person. But in relation to pre-trial detention it promises no more than the examination of the issues in a Green Paper.

⁷ ‘I cannot accept that it can ever be proper for a court, whose purpose is to uphold, vindicate and apply the law, to act in a manner which a statute---declares to be unlawful. ----I cannot accept that “compatible” bears a different meaning in section 6 of the Human Rights Act and section 57(2) of the Scotland Act, even though the statutory consequence is unlawfulness in the one instance and lack of power in the other. In each case the act is one that may not lawfully be done.’ (*per* Lord Bingham of Cornhill at paragraph 30.).

⁸ Criminal Procedure Act 1701, section 6 (Acts of the old Parliament of Scotland).

⁹ At paragraph 17.

¹⁰ (2009/C 295/01).

26. More generally, it would be difficult to apply any such requirement in relation to civil cases. But that does not invalidate the principle in relation to criminal proceedings, where the pressure on the accused person is greatest. If, in such cases, a failure to hold a trial within a reasonable time carries no sanction, beyond some monetary compensation, or a reduction in sentence, then the requirement may not be thought to be being observed with any real rigour.

27. Nevertheless, that seems to be the position in the ECtHR, by reference to which the Judicial Committee was able to reverse its previous decision. In the case of *Kudla v Poland*¹¹, the Court held that the applicant's rights, to a trial within a reasonable time, under Article 6(1) had been breached. In going on to consider the question of whether or not the applicant had open to him a remedy under Polish law, the Court observed:

‘It remains for the Court to determine whether the means available to the applicant in Polish law for raising a complaint about the length of the proceedings in his case would have been “effective” in the sense either of preventing the alleged violation *or its continuation*, or of providing adequate redress for any violation that had already occurred.’¹²

28. Similar formulations were used by the Court in two civil cases¹³ and in another criminal case¹⁴. It would therefore appear that the right to a trial within a reasonable time is not, like the other two factors mentioned in Article 6(1), something failure to implement which will nullify the proceedings. No doubt this is a pragmatic outcome, but it is hardly principled.

Right to good administration

29. This is a concept which is expressly provided for in Article 41 CFR. The position under the Convention is more elaborate. In relation to civil matters, Article 6 ECHR, as originally drafted, made no provision in relation to administrative justice. This appears to have been because the concept of ‘civil rights and obligations’ in that Article did not extend, in the Continental systems, to administrative tribunals, which were regarded as a matter of public law. This is clear from the dissenting opinion – by seven judges – in *Feldbrugge v The Netherlands*¹⁵. But the ECtHR was able to extend its remit to persons affected by administrative decisions by reference to the fact that such decisions would have a knock-on

¹¹ ECtHR 26 October 2000, Case No. 30210/96, *Kudla v Poland*.

¹² At paragraph 158.

¹³ ECtHR 10 September 2002, Case no. 57220/00, *Mifsud v France*; ECtHR 25 May 1999, Case no. 23308/94, *Cocchiarella v Italy*.

¹⁴ ECtHR 4 July 2006, Case no. 16631/04, *Zarb v Malta*: ‘Remedies available to a litigant at domestic level for raising a complaint about the length of proceedings are “effective” within the meaning of Article 13 of the Convention if they prevent the alleged violation or its continuation-----’ (at Paragraph 48).

¹⁵ ECtHR (1986) 8 EHRR 425 at 444. Cf the discussion by Lord Hoffman in *Begum v London Borough of Tower Hamlets* [2003] UKHL 5, at paragraphs 28 to 35.

effect on private law rights and obligations properly so called¹⁶. In considering cases in relation to administrative tribunals, the Court was careful to avoid requiring every such tribunal to be itself “independent and impartial”. In particular, it was content to leave the administrative, or policy, elements of a decision to the appropriate authorities in the state concerned, securing only that those matters bearing upon the procedural correctness of the decision making process were reviewable by a tribunal which was itself compatible with Article 6.¹⁷ And in due course it was established that that latter tribunal itself need not be capable of taking its own view of the merits of the decision reviewed; it was sufficient if it were able to satisfy itself that the decision-making body had acted correctly.¹⁸

30. It is interesting, if not remarkable, that the HRA has been interpreted as producing the same effect, in spite of what might be regarded as the clear words of the operative provision. Section 6(1) of the Act provides:

‘6(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.’

31. This very wide provision would appear to apply to all public authorities, including those exercising essentially administrative functions. But in cases argued since the Act came into force (on 1st October 2000) courts almost immediately began to deal with the matter as if it were Article 6 of the Convention which had become part of the law of the United Kingdom, and not section 6(1) of the 1998 Act. The jurisprudence has settled itself into a position analogous to that reached, after the cases mentioned above, by the ECtHR. Thus, in *Begum v London Borough of Tower Hamlets*¹⁹, Lord Hoffman observed, at paragraphs 52-54:

‘In this case the subject matter of the decision was the suitability of accommodation for occupation by Runa Begum; the kind of decision which the ECtHR has on several occasions called a “classic exercise of an administrative discretion”. The manner in

¹⁶ Cf ECtHR 16 July 1971, Case no. 2614/65, *Ringeisen v Austria*: ‘Although it was applying rules of administrative law, the Regional Commission’s decision was to be decisive for the relations in civil law---between Ringeisen and the Roth couple. This is enough to make it necessary for the Court to decide whether or not the proceedings in this case complied with the requirements of Article 6---.’

¹⁷ Thus, in *Albert and Le Compte v Belgium* 1983 5 EHRR 533, at paragraph 29, the Court observed: ‘---In many member States of the Council of Europe, the duty of adjudicating on disciplinary offences is conferred on jurisdictional organs of professional associations. Even in instances where Article 6---is applicable, conferring powers in this manner does not in itself infringe the Convention.-----Nonetheless, in such circumstances the Convention calls at least for one of the two following systems; either the jurisdictional organs themselves comply with the requirements of Article 6---, or they do not so comply but are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6.’

¹⁸ ECtHR (1993) 17 EHRR 116, *Zumtobel v Austria*, where the Court observed, at paragraph 32: ‘Regard being had to the respect which must be accorded to decisions taken by the administrative authorities on grounds of expediency and to the nature of the complaints made by the Zumtobel partnership, the review by the Administrative Court accordingly, in this instance, fulfilled the requirements of Article 6---.’

¹⁹ Cit. sup.

which the decision was arrived at was by the review process, at a senior level in the authority's administration and subject to rules designed to promote fair decision-making.----In my opinion the ECtHR has accepted, on the basis of general state practice and for the reasons of good administration which I have discussed, that in such cases a limited right of review on questions of fact is sufficient.----In the normal case of an administrative decision---fairness and rationality should be enough.'

32. This is no doubt an entirely reasonable approach for the courts to take, but it focuses on what is required by Article 6 of the Convention, and not on what appears to be required by the clear words of section 6 of the 1998 Act.

Ne bis in idem

33. One of the principal gaps left in the Convention as originally drafted was in relation to the principle of *ne bis in idem*. This is perhaps surprising. Unlike the application of Article 6 to matters of public administration which, as we have tried to demonstrate, was because of the difficulties which such an application might – and in fact did – cause, the principle of *ne bis in idem* was well established, certainly in the law areas of the United Kingdom, and also in European systems. The ECJ found no difficulty in describing it as a general principle as early as 1967²⁰. Moreover, in accordance with its importance in common law systems, it had been translated into the American Bill of Rights as a constitutional protection for the citizen. But it did not feature in the Convention. Its first appearance in an international Convention was in the International Covenant on Civil and Political Rights in 1966. Article 14(7) provides:

‘14(7) No-one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedures of each country.’

34. That is an unqualified provision, which reflects the importance of the principle. We are aware that the United Nations Human Rights Committee has ‘glossed’ the principle, in its commentary on the Covenant²¹ (but we are not aware on what authority it has done so). No

²⁰ ECJ, 15 March 1967, joined cases 18 and 35/65, *Gutmann v Commission of the EAEC*.

²¹ ‘In considering State reports differing views have often been expressed as to the scope of paragraph 7 of Article 14. Some States parties have even felt the need to make reservations in relation to procedures for the resumption of criminal cases.; It seems to the Committee that most States parties make a clear distinction between a resumption of a trial justified by exceptional circumstances and a retrial prohibited pursuant to the principle of *ne bis in idem* as contained in paragraph 7. This understanding of the meaning of *ne bis in idem* may encourage States parties to reconsider their reservations to Article 14, paragraph 7.’ (General comment 13(21), para 19.

doubt the reservations which gave rise to the Committee's comment were reflected in Protocol 7 to the European Convention, Article 4 of which provides:

‘4(1) No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

(2) The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

(3) No derogation from this Article shall be made under Article 15 of the Convention.’

35. The question of possible ‘fundamental defect’ in the original proceedings might well be thought to cast doubt on whether those proceedings could be said to be a proper trial for the application of the *ne bis in idem* principle. But where a criminal case has reached its conclusion, after any appeals and retrials allowed for by the criminal justice system concerned, it is difficult to see any logical distinction between the “*reopening*” of a case in the light of ‘new or newly discovered facts’ – which is permissible – and a simple *retrial* in the light of new or newly discovered facts – which is not!

36. It might accordingly be said that the formulation of Article 4(2) effectively negates the protection afforded by Article 4(1). And the ECtHR has itself sought to limit the application of Article 4(2). In *Radchikov v Russia*²² the Presidium of the Supreme Court in Russia had allowed a prosecution request for a ‘supervisory review’ of an acquittal in the light of what were described as ‘various deficiencies in the prosecution case file’. The ECtHR held that prosecution (or court) errors did not justify the use of Article 4(2):

‘---The Court considers that the mistakes or errors of the state authorities should serve to the benefit of the defendant. In other words, the risk of any mistake made by the prosecuting authority, or indeed a court, must be borne by the state and the errors must not be remedied at the expense of the individual concerned.’

37. The United Kingdom has neither signed nor ratified Protocol 7 (and a number of other Council of Europe states²³ have not ratified it). Statutes providing for exceptions to the rule against double jeopardy have been passed in England and Wales²⁴ and in Scotland²⁵. While the English Act expressly defines ‘new evidence’ (very broadly) as evidence not led in the

²² ECtHR 24 May 2007, Case no. 65582/01, *Radchikov v Russia*).

²³ Belgium, Germany, The Netherlands and Turkey (as at 15th September 2011).

²⁴ Criminal Justice Act 2003 (c.44) Part 10.

²⁵ Double Jeopardy (Scotland) Act 2011 (asp. 16).

original trial²⁶, both the Attorney General and the Director of Public Prosecutions have undertaken not to seek a retrial on the basis of evidence which was, or could with ordinary application have been made, available at the time of the original trial. The Scottish definition reflects the ECtHR's ruling in the *Radchikov* case (*cit. sup.*).

38. The approach of the European Court of Justice and, latterly, the Union to the principle of *ne bis in idem* has been different. As mentioned above, the first case in which the question arose was *Gutmann v Commission of the EAEC*²⁷, in which the Commission sought to re-open disciplinary proceedings against a Mr Gutmann, an employee of theirs. He claimed that these proceedings violated the principle of *non bis in idem*. The Court agreed:

39. 'In the light of the facts of this case, the possibility cannot be excluded that two disciplinary proceedings have been initiated on the basis of the same set of facts known to the Commission at the opening of the earlier proceedings, and founded on the same complaint.---As a result, the decision [ordering a further disciplinary inquiry to be held] must be annulled'. (at pages 66-67)

40. This was a decision based purely upon the legal principle that no-one should be tried twice for the same offence. It was not based, as were later decisions, upon respect for the principles of free movement.

41. When the Schengen Agreement was entered into, it contained an article, 54, which encapsulated the principle of *ne bis in idem* in the following terms:

'54. A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.'

42. In a number of decisions the ECJ has emphasised the importance of the principle in relation to the protection of the right to freedom of movement within the area of the Union.²⁸

Human dignity

43. The Charter, in Article 1, provides that:

'1. Human dignity is inviolable. It must be respected and protected.'

²⁶ S.78(2) 'Evidence is new if it was not adduced in the proceedings in which the person was acquitted----'.

²⁷ Joined cases 18 and 35/65.

²⁸ Cf. ECJ 9 March 2006, Case C-436/04, *Van Esbroek* at paragraph 34: 'As pointed out by the Advocate General---that right to freedom of movement is effectively guaranteed only if the perpetrator of an act knows that, once he has been found guilty and served his sentence, or, where applicable, been acquitted by a final judgment in a Member State, he may travel within the Schengen territory without fear of prosecution in another Member State on the basis that the legal system of that Member State treats the act concerned as a separate offence.'

44. The right in the Charter is based upon European law.²⁹ There is no equivalent right in the Convention. But the ECtHR has developed an extended content for the right to private life set out in Article 8. And there is a provision – Article 7 – in the Charter which also deals with respect for private and family life, and which is almost identical with Article 8 of the Convention. In the absence of any proper consideration of Article 1 CFR by a competent court, its scope must remain uncertain. In particular, it is not clear how far respect for and protection of human dignity can be regarded as a concept separate from the general right to and respect for private life which is enjoined by Article 8 of the Convention. Certainly, in the UK, some courts adopt an approach to Article 8 ECHR which clearly encompasses the concept of dignity. Thus, in the case of *Napier v The Scottish Ministers*³⁰, the petitioner, who was a prisoner on remand in a Scottish prison, complained about the conditions in which he was held, averring that they amounted to a breach of his rights under Article 3 of the Convention or, if not under Article 3, then under Article 8.

45. The judge (Lord Bonomy) observed:

‘It is my opinion that, as a result[of the regime to which he was subjected], the petitioner suffered psychological symptoms which anyone might experience as a reaction to the conditions in which he was detained – shame, disgust, loss of self esteem, low mood, anxiety, tension and anger-----’(at paragraph 37.)

46. His Lordship went to find that these conditions constituted a breach of the petitioner’s rights under Article 3. He considered the question of a possible breach of Article 8 in the event that he was found (by the Appeal Court) to be wrong in that conclusion, and went on to find:

‘It is plain that the detention of the petitioner in the squalid conditions which I have recounted, taken together with subjecting him to the regime of slopping out as it affected his routine, necessary, personal activities amounts, on the face of it, to an infringement of Article 8.’ (at paragraph 79)

47. The features of the regime to which the petitioner was subjected were, in his Lordship’s view, clearly such as to deprive him of his ordinary dignity

²⁹ ECJ 9 October 2001, Case C-377/98, *Netherlands v European Parliament and Council* at paragraphs 70-77.

³⁰ 2005 1 S.C. 229: ‘It is my opinion that, as a result[of the regime to which he was subjected as a remand prisoner], the petitioner suffered psychological symptoms which anyone might experience as a reaction to the conditions in which he was detained – shame, disgust, loss of self esteem, low mood, anxiety, tension and anger-----’ *per* Lord Bonomy at paragraph 37

48. The point was made even more clearly in *Campbell v MGN Ltd*³¹, in which Lord Hoffman, in the course of a discussion about developments in the law of confidence in England and Wales, observed:

‘What human rights law has done is to identify private information as something worth protecting as an aspect of human autonomy and dignity.-----Instead of the cause of action being based upon the duty of good faith applicable to confidential personal information and trade secrets alike, it focuses upon the protection of human autonomy and dignity – the right to control the dissemination of information about one’s private life and the right to the esteem and respect of other people.’ (at paragraphs 50-51)

49. If these developments are taking place in the context of Article 8 ECHR, what empty space is there for Article 1 CFR to occupy? The gap – if there was a gap – left by the absence of a specific reference to dignity, has been filled by the courts.

Q 2 What is the role of general legal principles: can they function as sources of fundamental rights protection?

50. Leaving aside the subject of the difference, within the Charter, between ‘rights’ and ‘principles’, it would be possible to answer the question, shortly, in the affirmative. It is certainly the case that some general principles have the effect of securing protection of human rights. It is equally the case that not all general principles do so. And there is difficulty, sometimes, in distinguishing between a general principle which serves to protect fundamental human rights, and which must on that account be preserved from alteration or diminution, and a general principle which merely reflects the views of society at the time it was put into place, and whose continuance or otherwise is not of great moment.

51. More generally, however, the question poses difficulties from the perspective of the United Kingdom, because of our particular constitutional arrangements. Common law systems tend to evolve general principles by way of successive court decisions to the same effect. And, as noted, *supra*, in the Introduction, the doctrine of the sovereignty of Parliament has made it difficult to say that any such principle, whether derived from common law or statute, is fundamental, in the sense either of being immutable, or of being capable of protection in the courts in the face of a contrary statute.

³¹ [2001] UKHL 22, [2004] 2 A.C. 457.

52. That said, the example given in the Explanation, of a right to good administration, is an excellent instance of a modern principle which has been developed by the courts in the United Kingdom into something which may perhaps be described as a fundamental right. During and following the Second World War, British Governments adopted a much more interventionist approach to public administration. Primary legislation empowered Ministers to make administrative decisions, and to promote detailed regulations, over a wide range of policy matters. In light of these developments the courts themselves developed rules which looked not so much at the merits of the decisions being made, but at the manner in which they were made, and whether those affected had had an appropriate opportunity to comment upon what was proposed before it took effect. While there remain some differences between Scotland and England, the rules are broadly the same in each jurisdiction, and have reached a considerable degree of sophistication. It would be difficult for any Government, in modern times, and in the face of opposition from the media and from pressure groups, to reverse these developments by legislation. But there is no formal statement in statute law as to the kind of right set out in Article 41 CFR.

53. An example the other way is the principle of *ne bis in idem*, or the rule against double jeopardy, which we have already discussed. This was established, separately, in both Scotland and England, at common law, that is to say, by rulings of the courts (made sometimes in the face of considerable opposition from the Crown (the Executive)). In each jurisdiction it developed over centuries into what might well have been described as a ‘fundamental right’ of the citizen. But, in each jurisdiction, it was very largely removed, or at least emasculated, by a single Act of the relevant Parliament³². (It would, for example, be much less easy to make a similar change in the right against double jeopardy in the United States Bill of Rights, because any alteration to the Constitution is procedurally and politically difficult to achieve.)

54. Further, the “general principles” are not the same in each jurisdiction. This is perhaps not entirely surprising from a philosophical point of view, given the separate development of the systems of law in Scotland and England, but it nevertheless produces some interesting contrasts. The right to trial by jury is certainly a fundamental principle of English law, deriving from Magna Carta in 1216. It gives the citizens of England the right to trial by their peers. The result is that even offences which may be thought to be relatively trivial or unimportant can be and are tried by juries.

³² Criminal Justice Act 2003 (c.44), Part X; Double Jeopardy (Scotland) Act 2011 (asp.16).

55. There is no such right in Scotland. A sheriff (a professional judge below the most senior level of court) sitting without a jury, and deciding himself on the guilt or innocence of the accused person, can impose a sentence of up to 12 months. Essentially, the decision as to whether to bring a prosecution before a court including a jury is made by the prosecutor, on the basis of how long a sentence the accused is liable to get if convicted. The accused himself has no right to demand trial by jury.

56. We should add that the principle is no longer immutable even in the UK systems which more or less follow the English practice. During the period of extensive terrorist activity in Northern Ireland, trials for even the most serious offences were routinely held before a judge sitting alone. Even apart from that, in England, there is now provision for a trial to be held before a judge sitting alone, where there are reasons to believe that the jury has been tampered with. And, for the purposes of the trial of the Lockerbie suspects was, the High Court of Justiciary sat, in the Netherlands, as a court of three judges, and without a jury.

57. Finally, the Explanation mentions procedural measures which can have the effect of securing fundamental rights. That is a common approach. The recent judgment of the ECtHR in the case of *Salduz v Turkey*³³ has effectively brought to an end the practice, set out in primary legislation in Scotland, whereby the police were able to interview a suspected person without the presence of his legal adviser, before formally charging him with an offence. The fundamental right which the Court was purporting to protect was the right to remain silent, and not to be required to incriminate oneself, which the Court has developed into a right to have legal advice before being asked any questions as to an alleged offence. Clearly in any situation where an accused person is alone in custody there is a risk that he will be put under undue pressure to confess to a crime. The solution, in Scotland, was to require all such interviews to be taped and videoed, so that there was an accurate record, available for the trial court, of what had occurred. The procedural requirements of taping and filming the interview secured the fundamental right which was to be protected

Q 3 To what extent is 'horizontal effect' of fundamental rights accepted in the Member States? How is the case law of the ECJ in this respect received?

58. Before answering the question we should point out that by 'vertical effect' we mean the application of fundamental rights in disputes between private parties and the state (public authorities) and by 'horizontal effect' we mean the application of fundamental rights in

³³ ECtHR 27 November 2008, Case No. 36391/02, *Salduz v Turkey*.

disputes between private parties. ‘Direct horizontal effect’ means that parties to a private law dispute can directly rely on fundamental rights as a cause of action whereas ‘indirect horizontal effect’ describes a situation where existing remedies are interpreted or developed in accordance with fundamental rights.

59. We will focus on the law in the United Kingdom as it currently stands. The entry into force of the HRA has led to significant changes in the way the courts deal with collisions of human rights. The HRA transposed the ECHR into domestic law, making it directly applicable in proceedings before the courts in the UK. Before the HRA entered into force in October 2000, there was no codified catalogue of human rights in the law of the UK. Instead, individuals could rely on so-called residual liberties, which allowed them to do whatever was not forbidden by the law. Naturally, these liberties did not enjoy a specifically protected status.³⁴ Constitutionally, the HRA is ‘only’ an Act of Parliament and could thus be repealed at any time. However, the HRA, as we have noted in the Introduction, disposes of some specific features: it is not subject to the doctrine of implied repeal³⁵, courts are under an obligation to interpret legislation ‘as far as possible’ in a way which is compatible with the ECHR³⁶ and where this is impossible higher courts can issue a declaration of incompatibility.³⁷ According to section 6, the HRA binds ‘core public authorities’ directly in everything they do and ‘hybrid public authorities’ wherever they perform functions of a public nature. ‘Core public authorities’ characteristically carry out functions of government.³⁸ ‘Hybrid public authorities’ only occasionally carry out such functions.³⁹ The HRA is silent regarding its impact on private law. But it is clear from section 6 HRA that there is no direct horizontal effect of the rights contained in the ECHR as private parties are not mentioned as being bound by the HRA.⁴⁰ However, the HRA explicitly provides that courts and tribunals are public authorities which means that even when deciding private law disputes, they are bound by the HRA.⁴¹ It is axiomatic that they must therefore comply with

³⁴ On the situation pre-HRA, cf. D. Oliver, ‘The HRA and the Private Sphere’, in: D. Oliver and J. Fedtke (eds.), *Human Rights and the Private Sphere* (Cavendish 2007) p. 63.

³⁵ A doctrine which says that in case of incompatibility between two Acts of Parliament, the later Act is deemed to have impliedly repealed the earlier Act.

³⁶ Section 3 HRA.

³⁷ Section 4 HRA.

³⁸ House of Lords, *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, at 163 (per Lord Rodger).

³⁹ The most controversial cases in this respect are cases of contracting out of public services, cf. House of Lords, *YL v Birmingham City Council* [2007] UKHL 27; on ‘public functions’ in general cf. R. Clayton and H. Tomlinson, *The Law of Human Rights*, 2nd edn. (OUP 2009) p. 229 et seq.

⁴⁰ Court of Appeal, *X v Y* [2004] EWCA Civ 662, para 54 (per Mummery LJ).

⁴¹ Section 6 (3) HRA.

the procedural requirements laid down in the ECHR. But legal practice has shown that their obligations as public authorities go further (1) by obliging them to interpret private law statutes in accordance with the ECHR and (2) by obliging them to develop the common law in line with ECHR requirements. This leads to an indirect horizontal effect of the rights contained in the ECHR. A claimant can thus rely on existing remedies found either in statutes or at common law which the courts have to interpret or develop in accordance with the fundamental rights laid down in the Convention.

60. An example of the application of section 3 HRA, which obliges courts to interpret Acts of Parliament in accordance with the ECHR, is the House of Lords case of *Ghaidan v Godin-Mendoza*.⁴² The plaintiff was the surviving same sex partner of a deceased tenant. He claimed that he should be allowed to stay in the rented flat as a 'statutory tenant'. The problem was that the right to become the 'statutory tenant' was only given to surviving spouses under the Rent Act 1977. The applicant argued that this was discriminatory and thus in violation of Article 14 ECHR taken together with Article 8 ECHR. The House of Lords agreed. It is interesting that the House of Lords was willing to interpret the Rent Act 1977 beyond the literal meaning of the words used in the Act. The Act speaks of 'the surviving spouse'. Speaking on whether it was 'possible' under section 3 HRA to interpret these words to include a surviving partner of a homosexual relationship, Lord Nicholls argued that section 3 was not limited to resolving ambiguities in the wording of Acts. The interpretative obligation decreed by section 3 was of an 'unusual and far-reaching character'. Since the interpretation in accordance with the Convention did not have any other ramifications but to allow the claimant to stay in the flat as a statutory tenant and fell within the social policy objectives pursued by the Rent Act 1977, the House of Lords found for the claimant. In contrast, the limits of section 3 are exceeded where an interpretation in accordance with the HRA would have far-reaching ramifications beyond the actual question before the court, which are ill-suited for determination by the courts.⁴³ This was held to be the case by the House of Lords in *Bellinger v Bellinger* regarding the question whether a man who had undergone gender reassignment surgery could be treated as a woman for the purpose of marriage to a man. The House of Lords felt that the implications of holding that this should be the case would be too far-reaching for it to decide and issued a declaration of incompatibility instead.

⁴² House of Lords, *Ghaidan v Godin-Mendoza* [2004] UKHL 30.

⁴³ House of Lords, *Bellinger v Bellinger* [2003] UKHL 21.

61. The prime example of the courts' duty to develop the common law in accordance with the requirements of the HRA is the development of the protection of privacy against intrusion by the press in recent years. The courts developed the tort of breach of confidence into a forceful cause of action.⁴⁴ In the case of *Campbell v Mirror Group Newspapers Ltd.* a famous model sought an injunction preventing publication of her treatment for drug addiction.⁴⁵ Lord Nicholls explicitly stated that there was no over-arching, all-embracing cause of action for 'invasion of privacy' in English law. But the cause of action of breach of confidence had been developed to protect aspects of privacy. The case of *Campbell* concerned the wrongful use of private information. Under the common law as it existed before the HRA, *Campbell* would not have had great chances of success. For instance, in *Kaye v Robertson* the Court of Appeal could not find a cause of action to prevent the defendant from publishing photographs taken of a famous actor in his hospital room where he was recovering from a serious accident.⁴⁶ The Court (*per* Glidewell LJ) stated that there was no right of action for breach of a person's privacy. *Campbell* shows that the introduction of the HRA has changed that. Lord Nicholls explicitly recognised that breach of confidence now recognised the values enshrined in Article 8 and 10 ECHR. Addressing the question of horizontality, he held that these values were as much applicable in disputes between private parties as in disputes between individuals and a public authority. The House of Lords was not unanimous on whether there was an invasion of the applicant's privacy or not. The majority held that the information in issue was private and confidential. Lord Hope distinguished between reports about the applicant's drug addiction as such, which he considered to be justified since the model had previously lied about her addiction. But regarding reports about her treatment, he considered the information to have been private since disclosure would be objectionable. The crucial test for him was what a reasonable person of ordinary sensibilities would feel if she was placed in the same position as the claimant and faced with the same publicity. But this alone was not sufficient to establish a breach of confidence. A balance needed to be struck with the competing right to free speech contained in Article 10 ECHR. Lord Hope proposed a test of proportionality stating:

'They are whether publication of the material pursues a legitimate aim and whether the benefits that will be achieved by its publication are proportionate to the harm that may be done by the interference with the right to privacy.'

⁴⁴ On the origins of that tort, cf. D. Oliver, 'The HRA and the Private Sphere', in: D. Oliver and J. Fedtke (eds.), *Human Rights and the Private Sphere* (Cavendish 2007) p. 63 at p. 83 et seq.

⁴⁵ House of Lords, *Campbell v MGN Ltd.* [2004] UKHL 22.

⁴⁶ Court of Appeal, *Kaye v Robertson* [1991] F.S.R. 62.

Attaching ‘good weight’ to the fact that reports and photographs about Campbell’s drug treatment might harm her, Lord Hope (and the majority of the House) came to the conclusion that there was an infringement of the right to privacy. It is important to note that in such cases there is no ranking of rights despite the existence of section 12 HRA, which gives some special protection in Article 10 cases where interim relief is sought. But this does not prejudice the balancing exercise carried out in cases such as *Campbell*.

62. An important aspect of the law of privacy recently appeared in the discussion about so-called ‘super injunctions’. Such injunctions are a relatively recent development by the courts⁴⁷ and some have been granted where the applicant tried to prevent publication of private information by the media. Super-injunctions are defined as injunctions where the parties must remain anonymous and the existence of which may not be disclosed by anyone. Super-injunctions regularly made the headlines over the last few years sometimes resulting in Members of Parliament disclosing the existence of such injunctions in Parliament availing themselves of the protection afforded by parliamentary privilege.⁴⁸ In response to the heated debates about them, a Committee on Super-Injunctions was established which delivered a report in May 2011 about their use. The conditions for their admissibility were clarified by the Court of Appeal in the case of *Ntuli v Donald*.⁴⁹ A member of a pop group had obtained a super-injunction in the High Court against a woman with whom he had had a relationship in order to restrain her from disclosing details of their relationship, especially sexually explicit details, to the press. It was held by the Court of Appeal that the super-injunction was not necessary. The musician’s right to privacy would not have been adversely affected had the fact of the injunction been reported. Furthermore, the Court of Appeal also decided that anonymity was not necessary. This shows that a strict necessity test needs to be carried out before a super-injunction can be granted.

⁴⁷ Cf. Report of the Committee on Super-Injunctions: Super-Injunctions, Anonymised Injunctions and Open Justice, chaired by the Master of the Rolls Lord Neuberger, at 2.1.; available at: <http://www.judiciary.gov.uk/media/media-releases/2011/committee-reports-findings-super-injunctions-20052011> [accessed 12 July 2011].

⁴⁸ The most prominent case so far occurred earlier in 2011 when ten-thousands of Twitter users leaked the name of a famous football player who had obtained a super-injunction preventing publication of a longtime affair with his brother’s wife.

⁴⁹ [2010] EWCA Civ 1276.

Q 4 How do Member States within their respective jurisdictions and EU institutions deal with cases of the collision of rights, both as regards collisions between classic rights (e.g. non-discrimination and freedom of expression or religion etc.), and collisions between on the one hand classic rights and socio-economic and cultural rights on the other (e.g. free movement rights and freedom of expression, religion) collisions between socio-economic and cultural rights inter se (e.g. right to strike and free movement)?

63. The answer to this question consists in a discussion of some relevant case law before the UK courts. Not all of the collisions mentioned have come before the courts yet. Since the courts in the United Kingdom are generally receptive towards the case law of the European Court of Justice it can be expected that the conflicts mentioned in the question would be resolved in a similar manner.

Collisions between classic rights

64. The answer to question 3 already contains an important example of how the courts approach conflicts between privacy and freedom of expression. Thus we will focus on conflicts between non-discrimination law and other rights. Non-discrimination legislation has recently been codified in the Equality Act 2010. The cases referred to are mainly based on legislation preceding the Equality Act. But since there have not been many substantive changes, it is still a good indicator of how the courts in the United Kingdom deal with discrimination cases. The Equality Act 2010 is directly horizontally applicable in a number of relationships, most notably in employment law but also against schools, in some contractual relationships etc.

65. Many contentious cases revolve around the conflict between non-discrimination law and freedom of religion. The leading case in this respect is the *Jewish Free School (JFS)* case.⁵⁰ In one of its first decisions, the majority of the newly formed UK Supreme Court found JFS's admissions policy to directly discriminate on the basis of ethnic origin thereby violating the Race Relations Act 1976. The school's admissions policy favoured the admission of children who were recognised as Jewish by the Office of the Chief Rabbi (OCR). The OCR recognised them as Jewish if their mother was a Jew at the time of their birth. A mother is considered to be Jewish either if her mother was Jewish or if she converted to Judaism in a manner recognised by the OCR. Thus the admissions policy was based on matrilineal descent, which the majority of the Court found to constitute discrimination on grounds of ethnic origin. The Court regarded the motive why the criterion

⁵⁰ UK Supreme Court, *R (on the application of E) v JFS Governing Body* [2009] UKSC 15.

of matrilineal descent was adopted (which was undoubtedly for religious reasons) to be irrelevant for the question whether the unequal treatment of children whose mothers were Jewish and children whose mothers were not constituted discrimination on the basis of ethnicity.⁵¹ This shows that under anti-discrimination law in the United Kingdom there is no justification for direct discrimination on the basis that such discrimination was mandated by religious convictions.⁵²

66. In another case, Bristol County Court held the owners of a Bed and Breakfast to have directly discriminated against a same sex couple in a civil partnership by denying them occupation of a double room which they had pre-booked. The reason for the refusal was that due to their religious convictions the owners only allowed married couples to stay in such a room. In the eyes of the judge, the direct discrimination resulted in the unequal treatment of people in a marriage and people in a civil partnership which was unlawful under the Equality Act (Sexual Orientation) Regulations 2007⁵³. The judge also found an indirect discrimination on the basis of sexual orientation.⁵⁴ The defendants' attempt to justify their behaviour on the basis of their religious convictions was not accepted by the Court which argued that the Regulations were compatible with Article 9 ECHR since that right was not absolute.

67. In a further case, a Catholic adoption agency (Catholic Care) appealed against a decision by the Charity Commission denying it permission to amend its rules in order to allow it to refuse to offer its adoption services to same sex couples. The Charity Tribunal did not accede to the Charity's argument that it should be allowed to discriminate in this manner for religious reasons under an exception clause in the Equality Act 2010.⁵⁵

68. This short review of the case law shows that discrimination cannot normally be justified on the basis of religious belief. The same is true *mutatis mutandis* for justifications based on freedom of expression. As regards harassment on the basis of one of the characteristics protected by the Equality Act 2010⁵⁶, there may be room for justification on the basis of freedom of expression or freedom of religion. In order to constitute harassment for the purpose of the Act, the conduct must have the purpose or effect of violating the victim's dignity or creating an intimidating, hostile (etc.) environment. The determination whether

⁵¹ para 64-65 (per Lady Hale); para 150 (per Lord Clarke).

⁵² para 35 (per Lord Phillips).

⁵³ Now part of the Equality Act 2010.

⁵⁴ Bristol County Court, *Hall and Preddy v Bull*, Case no 9BS02095.

⁵⁵ *Catholic Care (Diocese of Leeds) v The Charity Commission for England and Wales*, CA/2010/0007.

⁵⁶ Section 26 of the Act defines harassment.

such conduct leads to such an effect requires courts to balance competing rights such as freedom of expression.⁵⁷

Collisions between classic rights and socio-economic rights

69. The case of *Zagorski* concerning a potential clash between free movement rights (freedom to export goods) and classic fundamental rights (right to life/right not to be subjected to inhumane or degrading treatment) was decided by the High Court.⁵⁸ The plaintiff (on death row in the United States) applied for judicial review of a decision by the Secretary of State for Business not to ban the export of an anaesthetic which could be used for the plaintiff's execution in the United States. The case thus involved a potential clash of rights.⁵⁹ However, it was unsuccessful because the Judge did not find the Convention or the Charter applicable.⁶⁰ We have identified a potential for conflict between the provisions on free movement of persons and the rule against double jeopardy (*ne bis in idem*).⁶¹ The threat of (renewed) criminal proceedings is capable of deterring EU citizens from exercising their free movement rights.

Collisions between socio-economic and cultural rights

As regards the last category of potential clashes (socio-economic v free movement rights), there is no case law available. It should perhaps be noted that a free-standing (fundamental) right to strike has still not been clearly established in the law of England and Wales (even post *Viking*⁶² and *Laval*⁶³). Rather, it is only existent in so far as a lawful strike exempts a union from tortious liability which would otherwise result from it calling a strike.⁶⁴

Q 5 How does, or should, the balancing take place in the context of the multiplicity of EU, ECHR and national legal orders ('multilevel' legal order)?

70. The short answer to the question, as posed, is 'cautiously'. The treatment of 'classic', 'cultural' and 'socio-economic' rights differs from country to country, as a reflection of the their differing political and constitutional history and practices. As we have tried to explain,

⁵⁷ M. Connolly, *Discrimination Law*, 2nd. edn. (Sweet&Maxwell 2011), para 5-020.

⁵⁸ High Court, R (on the application of *Zagorski* v Secretary of State for Business, Innovation and Skills [2010] EWHC 3110.

⁵⁹ This is strictly speaking not a case involving horizontality since the case was brought against the Business Secretary. However, the interests involved were also those of the exporter.

⁶⁰ On the applicability of the Charter in this case, cf. *infra*.

⁶¹ Cf. *supra*, paras 34 et seq.

⁶² ECJ 11 September 2007, Case C-438/05, *Viking*.

⁶³ ECJ 11 September 2007, Case C-341/05, *Laval*.

⁶⁴ Court of Appeal, *Metrobus Ltd v Unite the Union* [2009] EWCA Civ 829 at 37 (per Lloyd LJ) and at 118 (per Kay LJ) who aptly called it a mere 'slogan or legal metaphor'.

in relation to the protection of fundamental rights in relation to the criminal law, such protection will almost inevitably be a ‘package’ of substantive law and procedural practice which combine to produce the desired result. Where a supra-national body descends below the level of desirable generality, and fixes on one aspect of such a package as requiring to be changed, so as to meet some perceived general aim, it runs the risk of upsetting the balance of one or more of these individual ‘packages’, with consequent difficulties for the system concerned. The Scottish institutional writer on criminal law, Professor Hume, observed in 1797, (when he was explaining why he was not minded to criticise aspects of the English criminal law):

‘In short, the whole train of proceedings in this or any other country, must be taken into consideration, in judging of any part. And if upon a complex view of the entire process, the prisoner appears to have a fair and equitable trial, in which innocence runs no risk of being ensnared or surprised; it is all that a reasonable man can wish for, and all perhaps that is attainable to human wisdom.’⁶⁵

71. We would accordingly hope that, so far as the ‘classic’ rights are concerned, the domestic courts of the Member States will be allowed to balance the difficulties caused by the overlapping influences of competing rights in the context of their own legal systems. Where intervention by the ECJ or the ECtHR is thought to be unavoidable, then it should be limited to what is necessary, and with due regard to the difficulties which adverse judgments may cause to the administration concerned. For example, in the case of *Grzelczyk v Centre public d’aide sociale d’Ottignies-Louvain-la-Neuve*⁶⁶ a French student studying in Belgium sought payment of a non-contributory allowance entitlement to which was based on a nationality requirement limiting eligibility to Belgian nationals. The Court persuaded itself that the relevant Directives did not preclude a French student from claiming the allowance. The Belgian Government asked the ECJ, in the event that it found that a foreign student was entitled to payment of the allowance, effectively to make the judgment prospective only, in light of the difficulty it would cause for the Belgian authorities if it were made retrospective. The Court felt able summarily to dismiss this claim, without suggesting that the Belgian Government had acted otherwise than in good faith, and without entering into any consideration of the real practical problems which a retrospective judgment would cause.

⁶⁵ Hume, *Commentaries on the Criminal Law of Scotland*, 1st edn., 1797, preface, at page xlvi.

⁶⁶ ECJ 20 September 2001, Case C-184/99 *Grzelczyk v Centre public d’aide sociale d’Ottignies-Louvain-la-Neuve*.

Q 6 What role does the legislature have in granting horizontal effect to fundamental rights? What is its role in ordering and prioritizing rights which might collide? In particular, what is the influence of the non-discrimination Directives on the exercise of other fundamental rights in the Member States

72. As noted in the answer to question 4, the United Kingdom has enacted a comprehensive Equality Act, which takes as its guiding principle a high level of protection against discrimination. Accordingly, the question for UK courts tends to be formulated around consideration of whether other rights, such as the right to free expression, or the right to religious freedom (as was relevant in the *Catholic Care* case mentioned in the answer to question 4) have been affected in a manner going beyond what is permissible in terms of the Convention. As shown by the *Kalanke*⁶⁷ and *Marschall*⁶⁸ cases, the effect of a rigorous interpretation and enforcement of non-discrimination legislation can create difficulties for Member States which wish to implement positive discrimination programmes.

73. Equally, fundamental rights are sometimes prayed in aid to strike down what might otherwise have been regarded as legitimate legislative activity by Member States. Thus, when the Flemish Government in Belgium set up a system of care insurance open to Belgians residing in the Dutch-speaking area and the area of Brussels-capital, and to persons living in another Member State and working in either of those areas, it was challenged on the grounds that it excluded persons residing in other areas of Belgium who worked in that area.⁶⁹ The decision is mentioned below, in the answer to question 12, to demonstrate the areas where European law does not provide a remedy. It is mentioned here to demonstrate how small that area is becoming. The rationale for the ECJ's decision that the system was incompatible with the principle of freedom of movement was set out in paragraph 53 of the judgment:

‘53. In any event, **it is not inconceivable**, given such factors as the ageing of the population, that the prospect of not being able or unable to receive dependency benefits such as those offered by the care insurance scheme at issue in the main proceedings should be taken into consideration by the persons concerned in exercising their right to freedom of movement.’ (emphasis added.)

74. Similarly, the occasional tendency of the ECtHR to state general, universally applicable principles in judgments arising out of the particular circumstances of a case from a single

⁶⁷ ECJ 17 October 1995, Case C-450/93, *Kalanke v Freie Hansestadt Bremen*.

⁶⁸ ECJ 11 November 1997, Case C-409/95, *Marschall v Land Nordrhein-Westfalen*.

⁶⁹ ECJ 1 April 2008, Case C-212/06, *Government of the French Community and Walloon Government v Flemish Government*.

state can have an adverse effect on the detailed arrangements in other states, where the surrounding circumstances are quite different⁷⁰.

75. Finally, on this question, the supra-national legislatures are not well suited to the amendment of fundamental rights set out in their own legislation and, accordingly, tend to leave the detailed working out of the implications of general provisions to the courts.

Q 7 Is the Charter perceived as being a mere continuation and consolidation of the previous (i.e. pre-Lisbon) sources of EU fundamental rights protection; or does the Charter provide added protection (or rights) as compared to the pre-Lisbon situation, if one looks at the case law in various jurisdictions since its entry into force?

Q 8 Has the distinction made in the Charter, especially in its official Explanations Relating to the Charter of Fundamental Rights (OJ 2007/C 303/02), between 'rights and freedoms' and 'principles' been reflected in the practice of courts and legislatures in the respective jurisdictions, as well as in the doctrine?

76. It will be convenient to answer both of these questions together, and we start by observing that there is little authority in the UK courts on the meaning of the Charter, although it has featured in at least one case. In the Court of Session (the supreme civil court) in Scotland, a prisoner sought a judicial review of a decision not to place him on the electoral roll for local elections.⁷¹ He alleged, *inter alia*, that Article 20(2)(b) of the Treaty, read with Article 40 CFR, conferred upon him a fundamental EU right to vote in such elections. The Court held that it was clear that the right to vote in local elections which was conferred by the Treaty only applied to such a right in a state other than the state of which the applicant was a national. Accordingly, since the Charter applied to Member States only when implementing EU law, it had no application in the case.

77. We turn now to some general comments on the interface between the Charter and the Convention. As originally conceived, the Charter was a general statement of fundamental rights prepared without prejudice as to whether or how it should be inserted into the treaties.⁷² When it was decided that it should be incorporated into the treaties, further work was necessary to turn it from an essentially political declaratory document into a legislative text. That took the form largely of additional provisions attempting to link some of the Articles of

⁷⁰ Cf. *Salduz v Turkey*, *cit. sup.*

⁷¹ *George McGeogh, application for judicial review*, [2011] CSOH 65.

⁷² 'There appears to be a need, at the present stage of the Union's development, to establish a Charter of fundamental rights **in order to make their overriding importance and relevance more visible to the Union's citizens**.-----It will then have to be considered **whether and, if so, how** the Charter should be integrated into the treaties.' (emphasis added) Cologne European Council, 3-4 June 1999, Conclusions of the Presidency, Annex IV.

the Charter with some of the Articles of the Convention, and to distinguish between rights and freedoms, on the one hand, and principles, on the other. In addition, a set of ‘Explanations’ was prepared.

78. The intention of these measures would appear to have been to secure that, in so far as it covered the same ground as the Convention, the Charter was indeed a ‘continuation and consolidation’ of pre-Lisbon EU fundamental rights protection. There is a question as to whether those measures will be found to have been successful.

79. With regard to the rights which cover the same subject area as rights set out in the Convention, Article 52(3) CFR provides that ‘the meaning and scope of those rights shall be the same as those laid down by the said Convention’. In that regard, it is unfortunate that, if that was indeed the policy intention of those drafting the Charter, they did not simply adopt the same wording. As the House of Lords Select Committee on the European Union pointed out, as long ago as 2000⁷³:

‘The---Charter will rely heavily on the rights set out in the ECHR.-----The ECHR is the ‘benchmark’ standard of human rights protection in Europe, and the Charter should reflect this. We cannot, however, emphasise too strongly the need for the text of the Charter to avoid paraphrasing or revising the ECHR. Rewording the ECHR guarantees would run the risk of confusion, as it would open the door to re-interpretation of existing ECHR guarantees based upon the new wording. At the level of the individual, it would only confuse and mislead if the Charter were to do anything other than restate the ECHR’s provisions in full including their qualifications and exceptions.’

80. It is of course a general principle of statutory interpretation that where two provisions are expressed in different terms, it is almost invariably because they are intended to convey different meanings and effects. So it remains to be seen whether a combination of Article 52(3) and the Explanations can overcome the fact that what are said to be the same concepts are expressed in different terms. And in some cases there are already acknowledged to be differences, even on the face of the Charter, the Convention and the Explanations.

81. Thus, Article 47 CFR (right to an effective remedy and to a fair trial) might be thought, by virtue of Article 52(3) CFR, to correspond to Articles 13 and 6 ECHR. But, according to the Explanations, that is not so. In particular, the reference to ‘civil rights and obligations’ in Article 6 of the Convention is not carried across into Union law, where protection is not so

⁷³ Eighth Report, 16th May 2000, at paragraph 138.

limited. This is an example, according to the Explanations, where the protection afforded to the individual by Union law is more extensive than that envisaged by the Convention. So, although Article 47 CFR *looks* as if it re-states the same principle as is covered by Articles 6 and 13 ECHR, it in fact provides wider protection to the individual.

82. We turn to a case in which the converse appears to apply. In relation to the principle of *ne bis in idem*, which we have already discussed, the differences are even more marked. Article 50 CFR is a simple prohibition on retrial where a person has already been acquitted or convicted ‘within the Union’. It goes further, in its terms, than Article 54 of the Schengen Convention. It goes much further than the Convention provision on the same subject, Article 4 of Protocol 7, which, as discussed above, effectively enables retrials to take place in the light of new evidence. The rationale for Article 54 of the Schengen Convention was not only the broad public interest in finality of legal proceedings, and in securing a person who had been tried once from the strain of a further trial. It also took account of the consideration that the possibility of a retrial in another Member State would interfere with the principle of freedom of movement. We would therefore suggest that this is another case where Union law already goes further than the Convention does, and that Article 50 CFR accurately reflects that intention. If that is correct, the provisions of Article 50 CFR may well be a continuation and consolidation of existing EU law, but they do not ‘correspond’ to the Convention provisions on the same subject.

83. We note in passing that the ECJ too is conscious of the implications of differences in wording between the Convention and the Charter. In *J McB v LE*,⁷⁴ the Court observed:

‘Moreover, it follows from Article 52(3) of the Charter that, in so far as the Charter contains rights which correspond to the rights guaranteed by the ECHR, their meaning and scope are to be the same as those laid down by the ECHR. However, that provision does not preclude the grant of wider protection by European Union law. Under Article 7 of the Charter, ‘[e]veryone has the right to respect for his or her private and family life, home and communications’. The wording of Article 8(1) of the ECHR is identical to that of the said Article 7, except that it uses the expression ‘correspondence’ instead of ‘communications’. **That being so, it is clear that the said Article 7 contains rights corresponding to those guaranteed by Article 8(1) of the ECHR. Article 7 of the Charter must therefore be given the same meaning**

⁷⁴ ECJ 5 October 2010, Case C-400/10 PPU, *J McB v LE*.

and the same scope as Article 8(1) of the ECHR, as interpreted by the European Court of Human Rights.⁷⁵ (emphasis added)

84. The second point we would make is that it seems likely that the protection afforded by EU law is going to drift, or be driven, further from the legal position under the Convention, even in areas where the rights protected by both documents do in fact correspond. We would refer to the European Commission's Impact Assessment⁷⁶ accompanying a Proposal for a Directive on the right to information in criminal proceedings. That proposal is one of the measures envisaged by the Roadmap agreed by the Council in 2009⁷⁷, and at paragraph 3.2 the Commission states:

‘The Roadmap points the way for EU action and gives the Commission a mandate to act on a series of measures which, taken together, will create a high standard of fundamental rights going well beyond the protection currently offered by Arts 5 and 6 ECHR. Taking this course will also give a specific EU meaning to the fair trial safeguards enshrined in Arts 47 and 48 CFREU.’

85. As at September 2011, when this paper is being drafted, the proposed Directive already contains provisions which would require the UK jurisdictions to provide more information to the defence than is required under existing UK law, or under the Convention.

86. In relation to ‘principles’ and ‘rights’, we note that the Explanations attempt to distinguish them so as to differentiate those rights entitlement to which is set out in the Charter, and those which require further legislative action before they become enforceable. Broadly, the latter class includes those mentioned in Chapter IV of the Charter. So far as we are aware, no case turning on the distinction has yet been argued in a UK court.

87. Finally, we turn to Protocol 30⁷⁸. The United Kingdom government has not claimed that the Protocol in any way exempts the UK from its obligations under the Charter. Indeed, that would be an odd proposition. In form, and indeed in substance, the Protocol is a statement agreed by all the Member States as to the effect of the Charter on Poland and the UK. It contains no amendment to the Charter in relation to those two states. It simply re-states three general provisions as to the application of the Charter. The first is that the Charter does not extend the ability of the ECJ – or of any other court – to find that the laws etc. of the UK are inconsistent with the fundamental rights which the Charter re-affirms. That is already the position set out in Article 51(2). Second, the Protocol clarifies that the

⁷⁵ At paragraph 53.

⁷⁶ SEC(2010) 907.

⁷⁷ 2009/C 295/01

⁷⁸ Protocol No 30 to the Treaty of Lisbon [2010] OJ C83/313.

principles set out in Chapter IV of the Charter will require further legislative action before they become justiciable. That is already set out in Article 52(5). Third, the Protocol clarifies that where the Charter refers to national laws and practices, that has effect, in relation to the UK, to the laws and practices of the UK. Again, this seems an unexceptionable statement of what might otherwise have been thought to be obvious.

88. We would therefore suggest that the legal effect of the Protocol, albeit couched in terms applicable only to Poland and the UK, is actually to spell out provisions which would apply just as much to every other Member State of the Union.

89. Whether the analysis set out above is correct is still a matter for conjecture: the full implications of the Protocol have not yet been established authoritatively. Certainly, in the political discussion after its adoption the Protocol was sometimes referred to as an ‘opt-out’ of the Charter. This view seems to have been adopted by a judge in the High Court of England and Wales, who stated that:

‘[g]iven the [...] Protocol, the Charter cannot be relied on as against the United Kingdom [...]’.⁷⁹

90. The Court of Appeal made a preliminary reference in the case to the Court of Justice *inter alia* asking about the relevance of the UK/Polish Protocol.⁸⁰ But it is interesting to note that the UK government’s representative before the Court of Appeal argued that the High Court Judge erred in its assessment, stating that ‘the purpose of the Protocol is not to prevent the Charter from applying to the United Kingdom, but to explain its effect’.⁸¹ Most commentators agree that Article 1(1) of that Protocol does not have any effect on the ECJ’s jurisdiction to find UK law to be inconsistent with the rights contained in the Charter since the wording of that Article is limited in that it only provides that the jurisdiction of the ECJ is not extended.⁸² However, should the ECJ find that the Protocol is a full opt-out of the Charter, the EU’s traditional unwritten fundamental rights would continue to bind the UK as far as it implements EU law and as far as it restricts the fundamental freedoms.⁸³

⁷⁹ Per Cranston, J., High Court, R (on the application of Saeedi) v Secretary of State for the Home Department [2010] EWHC 705 (Admin), para 155.

⁸⁰ ECJ pending Case C-411/10, *NS v Secretary of State for the Home Department*.

⁸¹ Quoted in [2010] EWCA Civ 990.

⁸² Cf. P. Craig, *The Lisbon Treaty* (OUP 2010) p. 239; C. Barnard, ‘The ‘Opt-Out’ for the United Kingdom and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reality?’, in: S. Griller and J. Ziller (eds.), *The Lisbon Treaty* (Springer 2008) p. 257 at pp. 266-268.

⁸³ Cf. ECJ 13 July 1988, Case 5/88 *Wachauf v Germany*; ECJ 18 June 1991, C-260/89 *ERT*.

Preliminary remarks on questions 9 to 14:

91. Questions 9-14 mainly address very recent or even future developments. It was therefore difficult to find country-specific material and thus to give answers with a focus on the specific situation of United Kingdom. Where we were unable to base our answers on developments in the United Kingdom, we have given our own views on the questions.

Q 9 Does EU accession to the ECHR overall add to the protection of fundamental rights of citizens; does it outweigh the procedural complications to which it may give rise, for instance when the EU is co-respondent, and more especially when a prior involvement of the ECJ in a case pending at the ECtHR would become possible?

92. Before answering the two questions, it should be pointed out that the United Kingdom's approval to the accession Treaty will not be subjected to a so-called 'referendum lock' under the European Union Act 2011. In a nutshell, the European Union Act 2011 subjects every further transfer of competences on the EU to a referendum. Section 10 of the Act makes it clear, however, that the government may give its approval to the accession agreement under Article 218 (8) TFEU once the agreement has passed through Parliament. This means that a referendum will not be necessary.

93. Overall, it is suggested that EU accession to the Convention will add to the protection of fundamental rights of people in the EU (whether they are EU citizens or not). The main innovation will be that the EU will become directly accountable in Strasbourg. Under the current state of the ECtHR's case law an individual can hold one or more Member States responsible as proxies where she alleges that a violation of her Convention rights can be found either in the EU's Treaties (primary law)⁸⁴ or in actions of the Member States required by EU law.⁸⁵ This approach will no longer be necessary. But what is more important than ironing out this procedural peculiarity, is that accession will close a gap in the ECtHR's jurisdiction to (indirectly) review EU law. This gap exists in cases where there was no Member State action but only action by the EU's institutions, e.g. the European Commission. In such cases, the violation cannot be attributed to the Member States as it did not occur within their jurisdiction as required by Article 1 ECHR.⁸⁶ Since the EU cannot at present be

⁸⁴ As was done e.g. in ECtHR, *Matthews v United Kingdom*, (no 24833/94) ECHR 1999-I.

⁸⁵ ECtHR 30 June 2005, Case No. 45036/98, *Bosphorus v Ireland*.

⁸⁶ ECtHR 9 December 2009 Case No. 73274/01, *Connolly v 15 Member States of the EU*.

a respondent in Strasbourg, there is no external human rights review. This gap would thus be closed in the event of the EU's accession to the Convention.⁸⁷

94. A further point is whether accession would affect the position of the Convention in the UK's legal order adding to the human rights protection already existent in the UK.⁸⁸ The UK Government stated in an Explanatory Memorandum that it did not expect accession to have any direct impact on UK law arguing that the fundamental rights guaranteed by the Convention already constitute general principles of EU law.⁸⁹ This view is largely correct. It should, however, be added that the main source of fundamental rights in the EU is now the Charter, which is of relevance to the Member States when 'implementing EU law'.⁹⁰ It is submitted that the Convention, which after accession would become an integral part of EU law, would be applicable under the same preconditions as the Charter. Thus as far as the Charter is applicable, accession would not substantially add to the protection of fundamental rights within the EU, i.e. before the national courts of the Member States or before the ECJ.

95. Turning to the procedural complications an accession may bring, the main problem in this respect would certainly be the introduction of the co-respondent mechanism. This mechanism might potentially lead to problems at three stages of the proceedings before the ECtHR: (1) the designation of a co-respondent; (2) the prior involvement of the ECJ; (3) the allocation of responsibility after the ECtHR's judgment.

96. Regarding the designation of the co-respondent, there are few procedural complications to be expected. Importantly, the draft agreement provides that the admissibility of an application would be assessed without regard to the participation of a co-respondent.⁹¹ This means that only when a case has been declared admissible will the ECtHR consider the question of a co-respondent. This is significant since most cases before the ECtHR are struck out at this stage so that there will be only few cases in practice in which the co-respondent mechanism will be applicable. Where the case is admissible, the EU or a Member State as the case may be, may ask the Court to join proceedings. It is entirely within the discretion of the co-respondent to join the proceedings or not. If a party to the Convention expresses its wish to join proceedings as a co-respondent, the Court is restricted to carrying out a

⁸⁷ The UK government also views a gap but identifies it to lie in the fact that the EU is currently not directly accountable to the ECtHR. The government's argument is therefore slightly ambiguous as it does not pinpoint exactly where the relevant gap in the protection for individuals is to be found (cf. House of Commons, Standard Note, EU Accession to the European Convention on Human rights, SN/IA/5914).

⁸⁸ Cf. on the HRA *supra*.

⁸⁹ the relevant extract of the Explanatory Memorandum can be found in the Standard Note, fn. 87.

⁹⁰ Article 51 (1) CFR.

⁹¹ Article 3 (1) draft agreement, CDDH-UE(2011)16.

superficial test.⁹² The Court may deny the status of co-respondent only in cases where it is implausible that it appears that the allegations call into question the compatibility with the Convention of a provision of secondary EU law or of primary EU law.⁹³ It is likely that the Court will deem these conditions to be met in every case where the applicant argues the incompatibility of EU law with the Convention. Thus proceedings which would be open for a co-respondent would be relatively easily identifiable.

97. The prior involvement of the ECJ might prove more problematic in procedural terms. A prior involvement is foreseen in cases where the EU has become co-respondent and where the ECJ has not yet assessed the compatibility of the relevant provision of EU law with the Convention rights at issue. This assessment is easily made where the ECJ has not at all spoken in a given case, i.e. where it was not involved by way of a request for a preliminary ruling under Article 267 TFEU.⁹⁴ But where the ECJ was involved, the ECtHR would have to consider whether the ECJ pronounced on whether EU law was compatible with the Convention. In some cases, the ECJ may not have made such an assessment because the referring domestic court did not ask it to do so. In other cases, the ECJ may have assessed the compatibility of a provision with fundamental rights, but maybe not with all the rights which the applicant argues the provision allegedly violates. Thus the ECtHR may be required to conduct an in-depth analysis of the ECJ's ruling, especially because the ECJ will not normally base its findings on the Convention but on the Charter. Thus it might sometimes prove difficult to assess whether the 'Convention rights at issue' were decided upon (e.g. where 'corresponding rights' are concerned⁹⁵).

98. An even greater procedural complication in connection with the prior involvement of the ECJ will be the determination of the correct procedure before it. Who should instigate such a procedure? Would the ECJ have to decide under an accelerated procedure provided for in Article 23a of its Statute every time or would it be in the ECJ's discretion whether it does so? It is clear from the draft agreement that as long as the ECJ has not pronounced, the proceedings before the ECtHR would have to be stayed. This is prone to lead to considerable delays unless the accelerated procedure was used. Finally, it is not at all clear how the ECtHR would have to deal with a finding by the ECJ that there was a violation of the Convention resulting in the ECJ declaring the EU act in question to be invalid. Would such a

⁹² Article 3 (5) draft agreement, CDDH-UE(2011)16.

⁹³ Article 3 (2) of the draft.

⁹⁴ There can be a number of reasons for this. Either because the domestic court of last instance did not see the need for such a ruling or because it considered that one of the CILFIT exceptions applied.

⁹⁵ On the problems regarding such rights, cf. *supra*, paras 79 et seq.

finding automatically deprive the applicant of her victim status? An argument against this is that the domestic court's decision still stands as *res judicata*. This means that for the case to become inadmissible in Strasbourg, there would have to be a reaction at Member State level, e.g. a reopening of the domestic procedure. This would have to be legislated for in each Member State.

99. The final procedural complication we can envisage is the allocation of responsibility between the EU and the Member State where the application to the ECtHR was successful. If the ECtHR were to make such an assessment it might be in violation of the autonomy of the EU's legal order as established by the ECJ.⁹⁶ Thus from the point of view of EU law, the assessment would have to be made in a procedure internal to the EU. One option would be that the EU and its Member States agree to always share the costs of proceedings in which one of them is a co-respondent (including possible payments as 'just satisfaction'). This would be an easy solution. But if this route is not taken, there would have to be a second set of proceedings between EU and Member States in order to find out who is truly to blame for the human rights violation. The ECJ would be an appropriate forum for this. But it would cost additional time and money. In any event, it should go without saying that after the ECtHR has found a violation, both respondent and co-respondent would be under an obligation to remove the violation (and to pay just satisfaction) no matter who is 'truly' responsible. Thus this stage of the proceedings would only be of interest to the EU and the Member States and should not affect the applicant in any way.

Q 10 The ECtHR Bosphorus ruling exempts Member State action covered by EU law from scrutiny on the rebuttable assumption of an overall conformity of EU measures with the ECHR. Is this 'double standard' of review of Member State action, depending on whether it is determined autonomously or on the basis of EU law, justified and acceptable to all Member States?

Have national courts followed the Bosphorus ruling in their case law when parties invoked the ECHR?

Does the Bosphorus presumption have the overall effect of shifting the ultimate authority concerning the question whether ECHR rights have been infringed from Strasbourg to Luxembourg?

Will the Bosphorus presumption be tenable, also in light of the purposes of accession to the ECHR?

100. In order to give a meaningful answer to this question, an important clarification needs to be made. The Bosphorus presumption only applies where the Member State was deemed not

⁹⁶ In detail cf. T. Lock, 'Walking on a Tightrope: the ECHR accession agreement and the autonomy of the EU legal order, 48 CMLRev (2011), 1025.

to have had any discretion in implementing its obligations under EU law. The rationale behind it is that where a Member State has no discretion it also has no opportunity to ‘add’ to the violation of the Convention rooted in its EU law obligations. Thus the EU Member State acted as if it were an executive organ of the EU. This means that in such cases the violation is really attributable to the EU. The Member State is only held responsible because the EU is not a party to the Convention so that there is some justification for letting the Member State ‘off the hook’. From the point of view of the applicant, however, this is unfortunate because he cannot hold the EU responsible in Strasbourg either so that there is no remedy under the ECHR for him in such cases.

101. There are no official statements regarding the presumption by the UK government or other representatives. But it is suggested that the United Kingdom has no objections to it. After all, it leads to its not being held responsible for (some) violations of the Convention rooted in EU law. There is no evidence that national courts of the UK have used the presumption. There is no reason to suggest that they should ever be in a position to do so. If they are convinced that a piece of EU legislation violates the Convention they would be under an obligation to make a reference to the ECJ.⁹⁷ They cannot opt to apply legislation which they believe to be in violation of the Convention save in the knowledge that the United Kingdom could not be held responsible in Strasbourg and that therefore their decision could not be challenged. But if there were a case in which implementation of an EU obligation appeared to conflict with rights under the Convention, that would cause particular difficulties for the UK’s devolved administrations, which ‘have no power’ to do anything which is incompatible with EU obligations or Convention rights (cf the Introduction).

102. Regarding the question of authority, it should be noted that there has not been a single case in which Strasbourg found a ‘manifest deficit’ resulting in a rebuttal of the presumption in *Bosphorus*. Thus the presumption has the practical effect of depriving the ECtHR from its jurisdiction to decide cases in which Member States had no discretion in implementing their obligations under EU law. In addition, one might also consider cases for which Strasbourg has refused to accept jurisdiction outright. These are cases in which there was no Member State action whatsoever, i.e. neither implementing action nor a preliminary reference by a national court.⁹⁸ In practice this leads to the European Court of Human Rights having jurisdiction over fewer cases regarding violations of the Convention found in EU law. Thus

⁹⁷ ECJ 22 October 1987, Case 314/85 *Firma Foto Frost v Hauptzollamt Lübeck-Ost*.

⁹⁸ ECtHR 9 December 2009 Case No. 73274/01, *Connolly v 15 Member States of the EU*; ECtHR 20 January 2009 App No. 13645/05, *Kokkelvisserij v Netherlands*.

it can be concluded that the ECtHR has relinquished some of its responsibility. As a result, the final say on these matters now lies with the EU's judicial system but not necessarily with the ECJ alone. The ECJ only has limited jurisdiction in such cases. Where there is no Member State measure such jurisdiction is laid down in Article 263 (4) TFEU.⁹⁹ And where there was implementing action by a Member State, the ECJ can only get involved via the preliminary reference procedure. But there is no guarantee that a national court will actually make a reference. The answer to the question should thus be that (to the extent that *Bosphorus* and other exceptions apply) the responsibility for the protection of human rights is vested in the EU legal system. Whether one should speak of a 'shift' in responsibility is not clear since a shift would pre-suppose that Strasbourg originally had responsibility over such cases.¹⁰⁰

103. A completely open question is whether the ECtHR will continue to uphold *Bosphorus* after accession by the EU to the Convention. There are good reasons to suggest that it should not. But at the outset it should be noted that the rationale given by the ECtHR for granting the Union's legal order the *Bosphorus* privilege is a substantive one: it is an acknowledgment that the protection of human rights in the European Union and by the ECJ is of such high quality that the ECtHR can afford to only exercise its jurisdiction where, exceptionally, the protection was manifestly deficient. After the entry into force of the Charter, it can be argued that the protection has even become better. Thus, one could contend that there are even fewer reasons for the ECtHR to abandon the presumption.¹⁰¹

104. It is argued, however, that the true reasons for the presumption lie elsewhere. The first is that the ECtHR wanted to show a degree of comity towards the European Court of Justice.¹⁰² It acknowledged that the ECJ has a monopoly to declare EU action invalid and that the EU, and with it the ECJ, is not formally bound by the Convention. The ECtHR attempted to avoid a conflict with the ECJ and sent a signal of respect, in return for the ECJ's past receptiveness towards the ECtHR's human rights case law.¹⁰³ The second reason for the *Bosphorus* presumption lies in the fact that the Member States, and not the EU, would be held

⁹⁹ E.g. in the *Connolly* case.

¹⁰⁰ Cf. the *M&Co.* decision by the European Commission on Human Rights, which may cause some doubt in this respect, ECommHR 9 February 1990, Case No. 13258/87, *M&Co. v Germany*.

¹⁰¹ L. Besselink, 'The European Union and the European Convention on Human Rights: From Sovereign Immunity in *Bosphorus* to Full Scrutiny Under the Reform Treaty?', in: I. Boerefijn and J. Goldschmidt (eds.), *Changing Perceptions of Sovereignty and Human Rights, Essays in Honour of Cees Flinterman* (Intersentia 2008) p. 295 at p. 305.

¹⁰² S. Douglas-Scott, 'Bosphorus v Ireland', 43 *Common Market Law Review* (2006), p. 243.

¹⁰³ For a discussion of that case law cf. T. Tridimas, *The General Principles of EU Law* (OUP 2006) p. 298 et seq.

responsible for violations of the Convention. The presumption is thus an acknowledgment of the fact that the EU, which in such cases is the potential violator of human rights, is not formally bound by the ECHR.¹⁰⁴

105. Once the EU is formally a party to the Convention, these two reasons no longer apply. As for comity, the European Court of Justice's decisions will now be subject to the scrutiny by the ECtHR. By acceding to the Convention, the EU will have agreed to have its legal system measured by the human rights standards of the ECHR. For the ECtHR, the ECJ will be a 'domestic court' and therefore no longer deserve special treatment.¹⁰⁵ Furthermore, the EU can now be a party to the proceedings before the ECtHR, at least as a co-respondent. It will no longer be the case that the Member States have to act as sole respondents in lieu of the EU. Therefore, there will no longer be a need for them to be privileged in cases currently covered by the presumption.¹⁰⁶ In addition, a continuation of the *Bosphorus* case law would go against the very spirit of accession which is to increase the human rights protection for the individual.

Q 11 Is the interpretation which the ECJ has so far given of the general provisions on the scope of the Charter, its relation to national constitutional rights and human rights treaties, and on restricting the exercise of rights (Title VII of the Charter) looked upon favourably?

106. At the time of writing (September 2011), there were only a handful of cases decided by the ECJ with regard to Title VII of the Charter. None of these cases has so far been commented upon in the academic discussion nor has any of these cases been referred to by the courts of the United Kingdom. The relevant cases are *DEB* and *McB*. In *DEB* the ECJ had to consider whether Article 47 CFR was broad enough to include a right to legal aid for legal persons and if so in what circumstances.¹⁰⁷ The applicant company was applying for legal aid in order to establish state liability of the German state under EU law. The Court referred to Article 51(1) CFR establishing that the Member States were only bound by its provisions when they are implementing EU law. However, it did not explicitly make the link between that Article and the case before it. It seems that the fact that the applicant was seeking state liability for a late implementation of a Directive by Germany was sufficient to satisfy Article 51 (1). The other case mentioning Article 51 (1) was *McB* who sought to

¹⁰⁴ Besselink, n , at p 303.

¹⁰⁵ Cf. Art 5 draft accession agreement, CDDH-UE(2011)16prov.

¹⁰⁶ For a more extensive argument, cf. T. Lock, 'EU Accession to the ECHR: implications for the judicial review in Strasbourg', (2010) 35 European Law Review, p. 777 at p. 797.

¹⁰⁷ ECJ 22 December 2010, Case C-279/09, *Deutsche Energie- und Beratungsgesellschaft*.

establish that fathers had a right to custody to their children even if this is not automatically recognised in the family law of the Member State. The Court only relied on the Charter when interpreting a Council Regulation and pointed to the limits of the reach of the Charter contained in Article 51 (2).¹⁰⁸ Unfortunately, the ECJ did not expand on this question.

107. Thus one of the most interesting open questions, under which circumstances the Charter is applicable to the Member States, has not been clarified. Article 51 (1) states that it is only when Member States are ‘implementing’ Union law. The bone of contention in the literature is whether this should be read narrowly, i.e. only catching scenarios in which the Member States acted as agents of the Union (like in the *Wachauf* decision¹⁰⁹) or whether a broader reading is appropriate, which would also capture cases in which Member States derogated from EU law (like in *ERT*¹¹⁰).¹¹¹ Closely linked to that issue, is the question in how far Article 51(2) CFR limits its scope. That provision states that the Charter does not extend the field of application of EU law beyond the powers of the Union or establish new Union powers. It is quite clear that the Charter itself does not give the Union new legislative competences in the field of fundamental rights. But it seems entirely open in how far Article 51(2) CFR can serve to limit the applicability of Charter rights where Member State action is concerned. The Court’s short reference to that article in *McB* did nothing to clarify the situation. Regarding a father’s right to custody in respect of his children, which had not been accorded to him under national law, the Court said that it ‘might’ infringe Article 51(2) CFR if such a right were read into the Charter. With this reference the Court managed to obscure more than it elucidated since it left it open whether this would actually constitute an infringement.

108. The insecurity in this respect became obvious in the case of *ZZ* in the English Court of Appeal, in which the Court of Appeal decided to make a preliminary reference to the ECJ.¹¹² The case mainly concerned the question whether a Member State which restricts the freedom of movement of an EU citizen on grounds of public policy under the Citizens’ Directive¹¹³ must reveal the essence of the allegations against that citizen. The claimant argued that it was disproportionate to withhold the grounds for this restriction since it constituted a

¹⁰⁸ ECJ 5 October 2010, Case C-400/10 PPU *McB*.

¹⁰⁹ ECJ 13 July 1988, Case 5/88 *Wachauf v Germany*.

¹¹⁰ ; ECJ 18 June 1991, C-260/89 *ERT*.

¹¹¹ For this discussion cf. Paul Craig, *The Lisbon Treaty* (OUP 2010) pp. 210-213; P. Carozza, ‘The Member States’, in: S. Peers and A. Ward (eds.), *The European Union Charter of Fundamental Rights* (Hart 2004) p. 35 at p. 42 et seq.

¹¹² Court of Appeal, *ZZ v Secretary of State for the Home Department* [2011] EWCA Civ 440.

¹¹³ Art. 27 (1) Directive 2004/38/EC.

violation of his right to an effective remedy under Article 47 CFR. *Kay LJ* argued that the Charter did not apply to the case since the United Kingdom did not implement EU law when restricting the applicant's right to reside in the United Kingdom.¹¹⁴ Furthermore he argued in light of Article 51 (2) that there is no Union competence in the field of national security so that the Charter could not apply since the refusal was based on national security considerations.¹¹⁵ *Carnwarth LJ* argued that the case was more concerned with the Directive and not with the Union's competence on national security. Thus he considered the argument that the Charter might apply to be worthy of exploration by the Court of Justice. A similar argument was put forward by *Moses LJ*.

109. Another English case worth mentioning in this respect is *Zagorski* which has been discussed earlier.¹¹⁶ The High Court found that a refusal to ban the export of a product fell within the scope of the Charter since it constituted an implementation of EU law according to Article 51(1) CFR. The High Court seemingly found *ERT* type cases (derogation from EU law) to be covered by the Charter. What is interesting is that *Zagorski* was not about derogations from EU obligations but about the refusal to derogate, thus provoking the question whether such a case could be considered an 'implementation of EU law'. Answering the question in the affirmative, the High Court reasoned convincingly that EU law provided for a power of derogation. Thus the question whether the Charter applied could not depend on which way the Business Secretary's decision of whether to ban the export or not went. The decision of whether or not to exercise the power was held to be an implementation of EU law in the sense of applying it or giving effect to it.¹¹⁷

110. A further point made by the High Court in *Zagorski*, was that *ratione personae* the Charter could only reach as far as the Convention. Having found that the Convention did not apply to the plaintiff because he was on death row in the United States and thus not within the jurisdiction of the United Kingdom as required by Article 1 ECHR, the Court went on to conclude that for the same reason the Charter did not apply either. The Court found this to be laid down in Article 52(3) CFR arguing that even though the Charter did not contain a provision similar to Article 1 ECHR, the Charter rights must have the same effect as the rights in the Convention. This not only included the content of the rights 'but also the scope of their application in the sense of the persons on whom the rights are conferred'.¹¹⁸ This

¹¹⁴ ZZ para 18.

¹¹⁵ ZZ para 17.

¹¹⁶ Facts *supra* at question 4.

¹¹⁷ *Ibid* at 70.

¹¹⁸ *Ibid* para 73.

view is novel in that it is neither reflected in the explanations to the Charter nor in the literature. Furthermore it is untenable for two reasons. First, the wording ('meaning and scope') of Article 52 (3) suggests that it is only concerned with the material scope of the right and not issues of jurisdiction as is Article 1 ECHR. Second, the High Court failed to see that Article 52(3) CFR explicitly allows for more extensive protection than the Convention.

Q 12 Is there a general EU human rights competence, or should there be such competence? What are the implications for the future of the ECHR system of protection of rights?

111. There is no evidence for a general human rights competence in the sense that the EU can legislate in all areas of human rights protection. To the contrary, the Treaties and the Charter make it clear that no such competence exists. Article 6(1) TEU states that the Charter shall not extend the competences of the Union as defined in the Treaties. Essentially the same is contained in Article 51(2) CFR. Furthermore, accession by the EU to the Convention must not affect the Union's competences. These provisions are evidence for a desire on part of the Member States to avoid an undermining of the principle of conferral contained in Article 4(1) TEU. Of course, as pointed out in the answer to question 11, the exact consequences of Article 51(2) CFR are not yet clear. But nobody seems to argue that the entry into force of the Charter has led to a general EU human rights competence.¹¹⁹ Such a competence cannot be inferred from 'positive obligations' to act resulting from such rights.¹²⁰ Even if an obligation to act results from one of the Charter rights, this does not necessarily mean that the EU is obliged to remedy the lack of protection by passing legislation. It is equally possible that the Member States might be under such an obligation. However, what can be witnessed is that EU legislation in the field of criminal law provides for extensive procedural guarantees which are there to comply with the requirements set out in Articles 47 and 48 CFR.¹²¹

112. Another point is the issue of 'reverse discrimination', i.e. a situation in which some nationals of the Member State are treated less favourably than others (including EU citizens). As EU law is not applicable in such cases, it cannot be relied upon.¹²² A solution has to be

¹¹⁹ There are individual EU competences, which could be defined as human rights competences, e.g. Article 157 (3) TFEU.

¹²⁰ On this argument, Carozza, n 111 at pp. 49-50.

¹²¹ Cf. *supra*, para 84.

¹²² ECJ 1 April 2008, Case C-212/06, *Government of the French Community and Walloon Government v Flemish Government*, para 38; this is the orthodox view; we will not comment on whether developments in EU law might bring changes to this.

found in domestic law. Since there is no general right to equal treatment laid down in the statutes¹²³, such a right would have to exist at common law in order to make reverse discrimination impossible in the United Kingdom. Traditionally there is no sophisticated, substantive principle of equality at common law.¹²⁴ In the Privy Council case of *Matadeen v Pointu*, Lord Hoffman argued that it was a general axiom of rational behaviour that that like cases should be treated alike and unlike cases differently.¹²⁵ But these comments cannot be read as granting a right to equality before the law since Lord Hoffman then went on to state that ‘the fact that equality of treatment is a general principle of rational behaviour does not entail that it should necessarily be a justiciable principle’.¹²⁶ There is thus no rule under the common law that would *per se* outlaw reverse discrimination.¹²⁷ A famous example in the United Kingdom for reverse discrimination is the issue of tuition fees charged at Scottish Universities. While Scottish students¹²⁸ and students coming from other EU Member States in effect pay no tuition fees at Scottish universities, students from the rest of the UK do.¹²⁹ From the point of view of UK constitutional law this is an expression of the constitutional settlement and a result of devolution.

113. A maybe more interesting question is whether there should be such a competence. Again, no such argument has been advanced. To the contrary, the political discussion in the United Kingdom appears to centre on the question of how to restrict the influence of ‘European’ human rights. A recent policy paper by Policy Exchange, a think tank, even argued for the UK’s withdrawal from the Convention, albeit only as a last resort.¹³⁰ The paper received considerable press coverage and was supported by Lord Hoffmann, a former Law Lord.¹³¹ This discussion is easily transferable to the question whether the EU should have a general human rights competence. It is suggested that there would be great deal of scepticism if not hostility in the UK concerning such a proposal.

¹²³ The Equality Act addresses discrimination in respect of certain characteristics.

¹²⁴ E. g. House of Lords, *Roberts v Hopwood* [1925] A.C. 578; for details cf. M. Connolly, *Discrimination Law*, 2nd edn., (Sweet & Maxwell 2011) at para 2-025.

¹²⁵ Privy Council, *Matadeen v Pointu* [1999] 1 AC 98 at 109; House of Lords, *M v Secretary of State for Work and Pensions*, [2006] 2 AC 91 at para 136.

¹²⁶ *Ibid.*

¹²⁷ High Court of England and Wales (QB), *R. v Secretary of State for Health Ex p. Goldstein*, [1993] 2 C.M.L.R. 589, para 35.

¹²⁸ Whether a student is ‘Scottish’ depends on their domicile within the United Kingdom.

¹²⁹ The same applies to EU and Welsh students at Welsh universities.

¹³⁰ Policy Exchange, *Bringing Rights Back Home*, available at: http://www.policyexchange.org.uk/images/publications/pdfs/PX_Keeping_Human_Rights_at_Home_WEB_07_02_11.pdf [visited 6 July 2011].

¹³¹ Until being replaced by the Supreme Court on 1 October 2009, the highest court in the UK was the Appellate Committee of the House of Lords and the highest judges were usually referred to as ‘Law Lords’.

114. Since there is no general EU competence, there are no implications for the future of the Convention system from that alone. But it is worth exploring what role is left for the Convention system after entry into force of the Charter. It is argued that there is still a considerable role for the Convention in future. Before the Lisbon Treaty, the Convention was merely treated as a source of inspiration for the ECJ when determining the content of the fundamental rights of the EU guaranteed as general principles of EU law.¹³² This has changed with the entry of force of the Lisbon Treaty and with it of the Charter. The Charter itself refers to the Convention in Article 52(3) CFR and formally incorporates its provision into EU primary law.¹³³ This leads to the Convention being a binding ‘minimum standard’ of fundamental rights protection in the EU. Furthermore, accession by the EU to the Convention will subject the EU directly to the jurisdiction of the ECtHR. This will be another way of ensuring that the Convention is respected by the EU and its institutions, most notably the ECJ.

Q 13 What role should be envisaged for EU institutions as to fundamental rights protection within a more polycentric constitutional system of Europe? Would you conclude on the basis of the development of the ever-widening scope of EU law and fundamental rights activity, as well as your discussion of the previous questions in your report, that a gradual but definite transfer of human rights protection has taken place from Member States to the EU and from the Council of Europe and ECHR to the EU?

115. The EU’s role is not that of a human rights organization, which has the aim of overseeing that human rights are adequately protected by its Member States no matter which institution of the Member State acted and in which particular function. The role of the EU’s institutions is different and resembles that of equivalent national institutions. Two of the EU’s institutions will have a crucial role to play with regard to human rights protection: the Commission and the ECJ. The European Commission is often described as the guardian of the Treaties and is thus also the guardian of the EU’s fundamental rights. It has the power under Article 258 TFEU to bring infringement proceedings against a Member State should it find that the Member State has violated the Charter. However, this power is limited in that the Member States are only bound by the EU’s fundamental rights when implementing EU law, cf. Article 51(1) CFR. Thus the supervisory function of the Commission differs from that which is typical for human rights organizations. A similar difference in function can be

¹³² W. Weiss, ‘Human rights in the EU: rethinking the role of the European Convention on Human Rights after Lisbon’, (2011) *European Constitutional Law Review*, p. 64.

¹³³ Weiss, *ibid.*

attested for the ECJ, which is not a general human rights court and can only adjudicate on human rights violations brought about by the Member States as far as they occurred within the scope of EU law. Thus the role of the EU's institutions in the protection of fundamental rights is constitutionally limited. They cannot fill out the function of an external control mechanism as they are internal to the EU.

116. This means that the ECtHR's broader jurisdiction which also covers human rights violations in areas outside EU law is still necessary. Furthermore, after accession the EU will itself be subjected to that Court's jurisdiction so that the ECtHR's role will certainly not be reduced.¹³⁴ The role of the national courts in protecting fundamental rights has not diminished either. Rather, one could argue that it may have expanded since national courts now have to apply the rights contained in the Charter as far as they bind the Member State.¹³⁵

117. For these reasons, it is difficult to establish that a transfer of human rights protection to the EU has happened or is about to happen. It is true that the EU (and most notably the ECJ) have gained jurisdiction over fundamental rights disputes. It is also to be expected that with a binding written catalogue of rights as a basis, the ECJ will seize the opportunity to expand its fundamental rights case law and adjudicate considerably more cases on these issues. But the notion of a transfer would suggest that national courts and the ECtHR would lose an equivalent amount of jurisdiction over fundamental rights cases. It is suggested that this is not the case since their role has not diminished. Thus the Charter will probably lead to an overall increase in cases brought before all courts concerned, with the ECJ having a larger share proportionately. But the overall caseload of national courts and the ECtHR is not set to diminish. One can therefore conclude that the relative influence of the ECJ for the development of fundamental rights in Europe is likely to grow but it would go too far to conclude that the overall responsibility for fundamental rights will be transferred to it. Rather it will remain a responsibility shared between different courts.

¹³⁴ One must also bear in mind the explanations to Article 52 (3) which state that regard must be had to the case law of the ECtHR when interpreting the scope of the corresponding ECHR rights.

¹³⁵ The exact ramifications for the Member States still need to be determined by the ECJ, cf. *supra* Question 11; cf. also the invocation of Charter rights before national courts in the ZZ case, *supra* fn. 106.

Q 14 Although fundamental rights protection in the EU has been triggered by Member State courts, the common constitutional traditions of Member States on fundamental rights protection have not functioned as an important direct source of protection in the case law of the ECJ. This gives rise to the general question what the role of the common and individual constitutional traditions can be at present and in future.

118. The determination of the content of fundamental rights in the EU is already a complex affair. This is largely due to the co-existence of a written fundamental rights catalogue (the Charter) and the unwritten (traditional) fundamental rights as general principles of EU law. Apart from the rights contained in the Convention, the common constitutional traditions of the Member States serve as sources of inspiration for their determination, cf. Article 6(3) TEU. The common constitutional traditions of the Member States have not featured as prominently as the Convention in the ECJ's case law on fundamental rights as general principles. It is suggested that this is largely due to difficulties in determining their precise content. In contrast, the Convention provided the Court with a written document which had been ratified by all Member States and could therefore be considered a common denominator. Moreover, the ECtHR's case gave the ECJ a rich pool of interpretations of these rights to draw on. Thus it is unlikely that the situation will change in the future given that the Charter provides the ECJ with a much more extensive written catalogue of rights and given that according to its Preamble the Charter reaffirms the existing rights as they result from the constitutional traditions of the Member States.

119. But there is an interesting discussion in the literature about the role of individual constitutional traditions and particularly those which *Nic Shuibhne* calls un-common traditions.¹³⁶ They could serve as 'fundamental boundaries', i.e. as a space in which diverse constitutional traditions can continue to exist even within the scope of EU law.¹³⁷ The main field of application for such fundamental boundaries would be cases in which Member States derogate from fundamental freedoms on grounds of public policy, etc., their own constitutional traditions might serve as justifications. An example usually advanced in this context is the *Omega* decision where the ECJ referred to the German concept of human dignity and its particular status under the German constitution.¹³⁸ This approach was taken up by the House of Lords. Citing *Omega*, Lord Bingham argued that the ban on fox

¹³⁶ N. Nic Shuibhne, 'Margins of appreciation: national values, fundamental rights and EC free movement law', *European Law Review* 2009, 34, p 230.

¹³⁷ The term was coined by J. H. H. Weiler, 'Fundamental rights and fundamental boundaries' in: *The Constitution of Europe: Do the clothes have a new emperor and other essays on European integration* (CUP 1999), p. 102; cf. also our answer to Question 5.

¹³⁸ ECJ 14 October 2004, Case C-36/02, *Omega v Bundesstadt Bonn*, para 34.

hunting¹³⁹ in the United Kingdom constituted a justifiable restriction of the freedom to provide services under EU law since the “killing of foxes [...] by way of recreation infringed a fundamental value expressed in numerous statutes”. Thus the House of Lords equally relied on a national value in order to justify a deviation from EU law.¹⁴⁰

120. The crucial (and unresolved) question is, of course, in how far national value judgments, which often have their roots in national constitutional traditions, should be accepted as justifications for deviating from free movement law. The ECJ’s most recent decision in *Sayn-Wittgenstein* sheds some light on this question but does not resolve it fully. The ECJ accepted an argument advanced by the Austrian government that in order to protect its own constitutional identity as a republic, it was justified in not fully recognising a name which one of its citizens had acquired by way of adoption since that name contained the designation of the applicant as a ‘princess’ (Fürstin). This deviation from the applicant’s right to free movement (she resided in Germany) was considered to be justified on public policy grounds since the Austrian law on the abolition of the nobility constituted an element of its constitutional identity.¹⁴¹ The Court was however adamant to point out that the public policy exception must be interpreted strictly so that its scope cannot be determined by a Member State unilaterally.¹⁴² This caveat shows that the ECJ is willing to accept individual constitutional traditions but only in limited cases. Unfortunately, there are no clear guidelines as to where the limits lie.

Conclusion

121. For the United Kingdom, the enactment of the Human Rights Act 1998, and the contemporaneous constitutional settlements, has caused a remarkable raising of the profile of human rights in law, practice and politics. The results have not always been universally welcomed. Internally, the courts’ attempts to balance the conflicting requirements of Articles 8 and 10 ECHR have aroused strong feelings. And some decisions of the ECtHR, as well as of the UK Supreme Court, have provoked strong reactions in Scotland. There is a general and perceptible feeling that the protection of human rights has become over-sophisticated and out of touch with public perceptions of what is fair and proportionate. There is as yet little

¹³⁹ Hunting Act 2004.

¹⁴⁰ House of Lords, *R (on the application of Countryside Alliance and others and others (Appellants)) v Her Majesty's Attorney General and another (Respondents); R (on the application of Countryside Alliance and others (Appellants) and others) v Her Majesty's Attorney General and another (Respondents) (Conjoined Appeals)* [2007] UKHL 52.

¹⁴¹ ECJ 22 December 2010, Case C-208/09, *Sayn-Wittgenstein v Landeshauptmann von Wien*.

¹⁴² *Ibid*, para 86.

experience upon which to assess the effect of the coming into force of the Charter. And accession to the Convention, with its accompanying technical difficulties, lies in the future.

122. It will be clear from the answers given above that, at present, the relationships between domestic (including devolved) law, the Convention and the Charter are so far, at least, complex and uncertain in their effects. They are of course, and not least for that reason, immensely interesting to lawyers. But neither the Convention nor the Charter was instituted to provide intellectual stimulation for the legal profession.

123. The challenge for all those involved in the business of giving effect to the Convention, of implementing the Charter and of acceding to the Convention, will be to secure – and to demonstrate – that the Convention, the Charter and, when it comes, accession operate so as to produce tangible, real, practical benefits to the ordinary individual.

PJL/TL September 2011

(Patrick.layden@scotlawcom.gsi.gov.uk)

(t.lock@surrey.ac.uk)

(The views expressed in this Report are the personal views of the rapporteurs, and do not represent the views of the institutions to which they belong)